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PREFACE

This monograph had its origin in an investigation carried on by the author while a member of the Economic Seminary of the Johns Hopkins University. The principal sources of information have been the trade-union publications contained in the Johns Hopkins Library. Documentary evidence was also supplemented by numerous personal interviews with trade-union officials.

The author wishes to express his appreciation of the helpful criticism and advice received from Professor J. H. Hollander and Professor G. E. Barnett.

D. P. S.

UNEMPLOYMENT AND AMERICAN TRADE UNIONS

CHAPTER I

STATISTICS OF UNEMPLOYMENT

Statistical information as to unemployment in the United States is less adequate and reliable than that as to almost any other social problem. The federal government, several of the States, and various other agencies have made censuses of the unemployed from time to time, but in the greater number of cases the data thus secured are of little value.

It is obvious that for an exhaustive study of the problem of unemployment there must exist adequate and trustworthy statistical information upon which to base the investigation. In other words, the problem must be stated before it can be solved. This is especially true for a study of the methods which the trade unions use in meeting the problem, since the amount and character of the unemployment in each trade necessarily determine the methods which each trade union uses. Thus, a trade union a majority of whose members are unemployed during certain seasons each year would not be likely to provide for the payment of out-of-work benefits during these periods, but would attempt to establish the policy of equal distribution of employment and encourage their members to seek employment in other occupations. On the other hand, trades in which the state of employment varies considerably from one community to another would probably attempt to establish employment bureaus in order to transfer their members from one city to another.

It will be the aim of this chapter to consider the sources of statistical information as to unemployment among organ-

ized wage earners, to consider briefly the data which appear to be the most reliable, and to attempt to determine the relative volume and character of unemployment in some of the principal trades, in order to show how different the problem is in the various trades and to make clear that conditions determine, to a great extent, the methods which each trade union employs to solve it.

The sources of statistical information as to unemployment among trade unionists are the publications of the state departments of labor and of the trade unions. While reference will be made to all the data which have been collected, only those data which can be more or less successfully utilized in the study will be particularly described.

The New York Department of Labor has collected since March, 1897, statistics of unemployment among the trade unionists of that State. From 1897 to 1914 it collected semi-annually, from all the trade unions, information as to the number of members employed and unemployed on the last working days of March and September, the causes of such unemployment, the number of members idle throughout the first and third quarters of the year, and the number of days which each member worked during these periods. The supply of this information was made compulsory by law. Since December, 1901, the New York Department has selected certain local unions in each trade and industry from which it has secured monthly returns as to unemployment. It has attempted to select local unions which have reliable and intelligent secretaries, to have each trade represented in proportion to the number of workmen engaged in each class, and to maintain the same proportionate representation from month to month so that the data may be comparable.

Both classes of statistics are of doubtful value. The secretaries of the local unions in many cases had no means by which they could determine the actual number employed and unemployed, and consequently they resorted to rough estimates. Further, there was a tendency to exaggerate the amount of unemployment in the hope that this would favor-

ably affect public opinion. These defects were especially inherent in the data collected semi-annually from all unions, and for this reason the collection of this class of data was discontinued in 1914. The data relating to selected unions are defective in many respects, but it is thought that, while they are of no great value as regards the actual amount of unemployment, they are of considerable importance in making apparent the movements in the state of employment from month to month and from year to year. It is for this reason that a summary of the data thus collected is given below. It may be well to state that these statistics represent about 235 local unions with a membership of 150,000, which is about 25 per cent of the trade-union membership of the State.

STATE OF EMPLOYMENT OF ORGANIZED LABOR IN NEW YORK STATE,
AS REPORTED BY REPRESENTATIVE UNIONS, 1901 TO 1915

(From Bulletins of the New York Department of Labor)

	Percentage of Members Unemployed on Last Working Day of											
	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
1902	20.9	18.7	17.3	15.3	14.0	14.5	15.6	7.1	6.3	11.2	14.3	22.2
1903	29.5	17.8	17.6	17.3	20.2	23.1	17.8	15.4	9.4	11.7	16.4	23.1
1904	25.8	21.6	27.1	17.0	15.9	13.7	14.8	13.7	12.0	10.8	11.1	19.6
1905	22.5	19.4	19.2	11.8	8.3	9.1	8.0	7.2	5.9	5.6	6.1	11.1
1906	15.0	15.3	11.6	7.3	7.0	6.3	7.6	5.8	6.3	6.9	7.6	15.4
1907	21.5	20.1	18.3	10.1	10.5	8.1	8.5	12.1	12.3	18.5	22.0	32.7
1908	36.9	37.5	37.5	33.9	32.2	30.2	26.8	24.6	24.6	23.1	21.5	28.0
1909	29.3	26.5	23.0	20.3	17.1	17.4	13.9	11.9	14.5	13.7	13.3	20.6
1910	24.5	22.4	22.6	16.0	14.5	15.4	19.4	22.3	12.5	15.0	17.5	27.3
1911	26.7	24.8	25.6	21.3	27.2	22.9	15.5	11.7	11.2	11.6	20.0	34.2
1912	25.8	17.6	18.8	13.3	20.1	22.8	21.1	9.1	5.9	7.4	15.3	30.1
1913	38.2	33.4	21.8	21.7	22.9	22.2	20.8	19.6	16.2	19.3	27.8	40.0
1914	32.3	30.7	28.3	23.6	22.7	25.5	32.5	30.3	24.3	24.9	35.8	35.7
1915	40.1	32.2	27.4	26.4	31.8	25.5	26.0	19.3	14.9	12.7	17.6	21.9

The table clearly indicates the fluctuations in employment from month to month and from year to year. During 1902, 1903, and 1904 the average percentage of unemployment was around 13, but gradually decreased until the depression of 1907 and 1908 when it sharply rose, gradually dropping however after the spring of 1909. During 1910 and 1911 the

percentage was fairly constant, but there was a 25 per cent decrease in unemployment in 1912; for several of the months the percentages were lower than they had been for five or six years. However, after November, 1912, the percentages, if we disregard seasonal fluctuations, gradually rose until the fall of 1915.

It will be noted that during the past seven years an average of between 20 and 25 per cent of the workmen in the selected unions have been returned as unemployed on the last working day of each month. The minimum percentage for the period was 5.6 in October, 1905, while the maximum was 40.1 in January, 1915. The instances in which the monthly percentage was under 10 number less than twenty-five. The seasonal fluctuations are clearly indicated in the table. January reports the highest percentage of the year, after which the percentage drops gradually to September and October, in which months it appears that there is less unemployment than at any other time. November and December show very high percentages.

The Massachusetts Bureau of Statistics, since March, 1908, has collected data as to unemployment from trade unions situated in that State. This information is comparable, in many respects, to that collected by the New York Department. In Massachusetts information as to unemployment is secured only from those unions which desire to report their working conditions. However, the majority of the trade-union membership is represented in the returns. Thus, for the quarter ending September 30, 1915, returns were made by 1052 local unions representing 175,754 organized wage earners, or approximately 75 per cent of the trade-union membership of the State.¹ Monthly returns are not made by any of the unions, reports being made only for the last working days of the four quarters of the year by the secretaries of the local unions. The returns are scrutinized by the bureau's experts and if any errors are apparent the schedules are returned for correction.

¹ The Thirty-first Quarterly Report on Unemployment in Massachusetts: Quarter ending September 30, 1915, p. 1.

The following table shows the percentage of members unemployed at the end of each quarter from March, 1908, to December, 1915:

STATE OF EMPLOYMENT OF ORGANIZED LABOR IN MASSACHUSETTS
(From Bulletins of the Massachusetts Bureau of Statistics)

	Percentage of Members Unemployed.			
	March 31	June 30	September 30	December 31
1908	17.9	14.4	10.6	13.9
1909	11.4	6.4	4.8	9.4
1910	7.1	7.0	5.6	10.2
1911	10.4	6.6	5.6	9.7
1912	14.1	5.3	4.7	9.1
1913	11.3	6.4	6.8	10.4
1914	12.9	9.9	11.0	18.3
1915	16.6	10.6	7.0	8.6

The striking fact disclosed by these figures is their great disparity with the New York data. When idleness due to other causes than lack of work, lack of material, and the state of the weather has been eliminated, the averages of the New York and Massachusetts percentages for the last working days of the four quarters of the year, for the period 1908-1915, are 19.2 per cent and 7.5 per cent respectively. The most plausible explanation of this difference is the larger proportion of highly seasonal workmen represented in the New York data. In the reports for June 30, 1915, for example, the building trades represent more than 25 per cent of the workmen included in the New York report,² while in the Massachusetts figures for that date the returns for the building trades constitute less than 20 per cent of the total figures.³ But what appear to be of even greater importance are the different proportions of the totals represented by garment workers. In the returns for June, 1915, the garment workers constituted 21 per cent

² Idleness of Organized Wage Earners in the First-half of 1915, Bulletin of the New York Department of Labor, whole no. 73, p. 11.

³ Calculated from table in Thirteenth Quarterly Report on Unemployment in Massachusetts, June 30, 1915, p. 11.

of those included in the New York returns,⁴ while in the Massachusetts data for that date this class of workmen formed less than 3 per cent of the members reporting.⁵ Unemployment in the building trades and in the garment industry of New York is twice as great as the average in other trades taken together. Thus, the average of the monthly percentages of unemployment in the building trades from 1907 to 1914 in New York was 29, and that for the garment industry was approximately the same, while the average of all industries was only 22 per cent. When it is remembered that the average of all industries is weighted in proportion to the relative representation of trades, and that the garment workers and building trades mechanics constitute more than 50 per cent of the total, the effect of the great amount of unemployment in these two industries upon the average percentage is easily seen.

The New Hampshire Bureau of Labor is the only other state bureau which has collected statistics of unemployment among organized wage earners, and these statistics are practically valueless as they give only the percentages of members unemployed throughout the first and second quarters of 1915. It seems that the secretaries of the local unions, in most cases, were unable to accurately report such information.

A number of the American trade unions have attempted to collect statistics of unemployment of their members. Generally these attempts have failed, either because the secretaries of the local unions refused to report conditions accurately, or because the secretary of the national union failed to recognize the importance of the statistical information as to unemployment. The unions have the opportunity of collecting such material at small expense. In all unions the secretaries of the subordinate branches make monthly reports to headquarters concerning various sub-

⁴ Bulletin of the New York Department of Labor, whole no. 73, p. 11.

⁵ Calculated from table in Thirteenth Quarterly Report on Unemployment in Massachusetts, June 30, 1915, p. 11.

jects, and where statistical information as to unemployment has been collected these monthly reports have generally been utilized for this purpose.

The American Federation of Labor collected from 1899 to 1908 data relating to unemployment among members of its affiliated unions. The number of workmen represented in the returns varied as much as 800 per cent from one month to another in the same year, and as the reports were made by the secretaries of the national unions it is obvious that the data secured were not accurate. For this reason the collection of this information was discontinued in 1909.

The Wisconsin State Federation of Labor has collected statistics of unemployment from its affiliated unions since 1912. The information collected in 1912 was worthless and that for the two succeeding years was far from satisfactory. In 1913 the affiliated unions were requested to report the percentages of members unemployed on September 1. Returns were made by 243 local unions with a total membership of 19,921. Of these, 1436 members, or 7.2 per cent, were reported as idle.⁶ This percentage is but four-tenths of one per cent higher than that of Massachusetts for September 30 of the same year, while it is 12.8 lower than the New York percentage for August 31.

A few unions have realized the benefits accruing from the collection of statistical information as to unemployment and have accordingly provided in their constitutions that the local union secretaries shall report the state of employment at specified periods. For example, the Potters,⁷ Plumbers,⁸ Boilermakers,⁹ Iron Molders,¹⁰ Lithographers,¹¹ Elevator Constructors,¹² and Metal Polishers¹³ require the secre-

⁶ Labor Conditions in Wisconsin: Second Report by the Executive Board of the Wisconsin State Federation of Labor, July 1, 1914, p. 15.

⁷ Constitution, 1913, sec. 132.

⁸ Constitution, 1913, sec. 36.

⁹ Constitution for Local Unions, 1914, art. 2, sec. 6.

¹⁰ Constitution, 1912, art. 5, sec. 1.

¹¹ Constitution for Local Unions, 1913, art. 5, sec. 1.

¹² Constitution, 1910, art. 6, sec. 3.

¹³ Constitution, 1913, art. 32, sec. 1.

taries of their subordinate unions to report either monthly or quarterly the number of members employed and unemployed. But little attention is paid by the secretaries to these provisions, and in the unions where the information is reported it is neither used by the general secretaries nor compiled for publication.

The Painters, Paperhangers, and Decorators at their convention in 1913 provided that an official "time book" should be issued to each member of the union, who was to record in it all time lost through unemployment and the causes of such idleness, and report quarterly to his local union. The secretaries of the subordinate branches were instructed to compile these reports and send them to the national union.¹⁴ It was thought that much valuable information could thus be secured. Considerable light would have been thrown upon the question of variation in unemployment among localities. However, it was found impossible to secure the desired information from the members except through a system of fines, which, of course, would have had a tendency to produce inaccurate statistics. Consequently, these time books are used in only a few unions.¹⁵ It is understood that the Chicago local union has collected statistics of unemployment from its members for five or six years. It was reported at the convention in 1913 that the data collected in the two previous years indicated that the average painter lost ninety-eight working days each year through inability to secure work.¹⁶

The Glass Bottle Blowers have collected and privately published statistical information as to unemployment among its members for several years. But in consequence of the fact that no distinction is made between the members totally unemployed and those working as "spare men" this information is of little value. There is also available in the monthly journals of the Wood Carvers data as to the number of members employed and unemployed on the last

¹⁴ Constitution, 1913, sec. 238.

¹⁵ Interview with General Secretary Skemp, August, 1915.

¹⁶ Proceedings, 1913, p. 635.

working day of the month. Percentages of unemployment have been calculated for the period 1909-1915, and there is little fluctuation in them from month to month and from year to year, the rate of unemployment ranging between twenty and twenty-five per cent. This would seem to indicate that the returns are not accurate but mere estimates of the secretaries.

The only statistics of unemployment collected by the trade unions which it was possible to utilize in this study are the data collected by the Bricklayers, Masons and Plasterers from 1882 to 1911, by the Pattern Makers from April, 1907, to December, 1916, and by the Flint Glass Workers from 1907 to 1915.

In view of the fact that so little attention has been given to the collection of data as to unemployment in the United States before 1900, it is rather surprising to find that the Bricklayers' Union, organized in 1865, collected semi-annually statistics of unemployment from 1882 to 1911 and monthly thereafter.¹⁷ These statistics are based upon the reports by the local secretaries of the number of members employed and unemployed. Not all of the unions reported, as some were always in a state of disorganization or were involved in labor disputes; but the reports are fairly representative of the entire membership, and the average percentage of the membership included in the data for the period 1882-1911 is 79.1. There is no reason to believe that those unions which are not represented in the returns, except the few on strike, had more or less unemployment than the average of those reporting. The returns unfortunately include members who were reported as unemployed on account of labor disputes and illness. Of course the inclusion of these members has produced high percentages of unemployment.

Another important question is whether the secretaries correctly reported the number of the unemployed. Secre-

¹⁷ The data collected since 1911 have not been compiled, the secretary merely using the information. (Interview with Secretary Dobson, August, 1915.)

taries of unions having less than fifty members could easily determine the number of unemployed, since they generally knew the places where members were at work ; but in unions with a larger membership—many of the local unions have from 100 to 7000 members—the secretaries were unable to make exact returns from their own knowledge. In such cases the secretaries either based their returns upon rough estimates or upon the reports of the stewards. It is impossible to determine the extent to which the stewards' reports were used. It would not have been difficult to ascertain the exact number of members employed on a given day if these reports had been used, because each week the stewards on the various jobs reported the names of all members working on particular days. The reports are supposed to give the number of members employed and unemployed on the last working days of June and December ; but it is understood that frequently the returns were based upon the condition of trade slightly before and after these dates. These data are presented in the following table, principally because they represent the only continuous record respecting unemployment in the United States before 1897.

**UNEMPLOYMENT OF MEMBERS OF THE BRICKLAYERS, MASONS AND
PLASTERERS**

(From Semi-Annual Reports of the General Secretary)

Year	Percentage of Members Unemployed		Year	Percentage of Members Unemployed	
	June	December		June	December
1882	10.0	20.2	1897	41.4	51.7
1883	4.6	26.4	1898	38.8	47.6
1884	11.1	48.6	1899	18.2	31.2
1885	20.5	33.6	1900	29.8	34.7
1886	15.1	36.7	1901	8.8	20.9
1887	6.0	37.1	1902	10.5	23.8
1888	15.2	37.3	1903	11.5	45.8
1889	13.3	34.1	1904	14.2	36.9
1890	12.5	37.1	1905	10.5	23.4
1891	24.8	37.2	1906	11.7	24.0
1892	18.7	37.6	1907	16.4	51.2
1893	22.2	67.7	1908	42.2	48.8
1894	49.6	54.6	1909	17.2	30.1
1895	28.1	43.2	1910	12.8	30.2
1896	33.3	55.9	1911	26.3	

As was to be expected, the figures show great differences in unemployment between summer and winter. Every one realizes that there is, on the whole, less work for bricklayers in December than in June; but few realize how great the difference is. December 31 and June 30 may be taken as dates representative of the poor and good seasons of employment in the building industry. It is to be noted that, without exception, in the period 1882-1911 unemployment was greater in December than in June of any one year. The mean of the December figures is 37.47 per cent, while the mean of the June figures is only 19.84 per cent. By taking the average of the percentages for the two seasons over a period of thirty years the effects of special circumstances, cyclical fluctuations, and general changes of level may be eliminated or made inappreciable, and the seasonal fluctuation alone is seen. The table also discloses a remarkable series of waves of good and bad employment. The average unemployment for the four minima, 1882, 1883, 1901, 1905, is 15.6 per cent or one-third of the maximum. It would be interesting, if the statistics of a sufficient number of years were available, to compare this range with the fluctuations in other trades. Beveridge has shown that in England those trades which are most regularly affected by seasonal movement from month to month are those least affected by a cyclical fluctuation from year to year.¹⁸ From an examination of the existing statistics in the United States it appears that this does not hold true in this country.

The Flint Glass Workers have collected quarterly statistics of unemployment since 1907, but the data are fragmentary from 1907 to 1912. In 1913 the union also included in its inquiry questions as to the number of members who were unemployed at the trade, but who had secured temporary employment in other lines of industry. Accordingly, the local unions were requested to report the number of members employed at the trade, the number holding hon-

¹⁸ W. H. Beveridge, *Unemployment: A Problem of Industry*, 1909, p. 40.

orary membership, disabled, and working outside the trade, and the number of those who were willing and able to work but had not found employment of any kind.

The following table shows the data thus collected :

UNEMPLOYMENT OF MEMBERS OF THE FLINT GLASS WORKERS UNION
(From Quarterly Reports of the Secretary)

	Percentage of Members		
	Employed at Trade	Employed Outside Trade	Unemployed
1907 Aug. 31	80	—	20
Nov. 30	82	—	18
1908 Feb. 28	80	—	20
1909 Feb. 28	87	—	13
1910 Feb. 28	87	—	13
May 31	84	—	16
1911 Feb. 28	87	—	13
May 31	85	—	15
1912 Feb. 28	87	—	13
May 31	87	—	13
Aug. 31	80	—	20
Nov. 30	90	—	10
1913 Feb. 28	91	—	9
May 31	90	6	4
Aug. 31	86	8	6
Nov. 30	87	7	6
1914 Feb. 28	87	6	7
May 31	84	8	8
Aug. 31	74	9	17
Nov. 30	76	13	11
1915 Feb. 28	76	10	14
May 31	81	7	12
Aug. 31	80	8	12
Nov. 30	85	9	6

The percentage of the members employed at the trade, it will be noted, varied from 74 on August 31, 1914, to 91 on February 28, 1913. The means for the four quarters for the period 1912-1915 were 83, 84, 78 and 81 per cent. It appears that the state of employment is, on the average, practically the same in all four quarters. Since 1913 of those not employed at the trade on the average 8.2 per cent were employed outside the trade, while 9.1 per cent were returned as unemployed.

The fact that many workmen secure subsidiary employ-

ment when they are unable to secure employment at their principal occupations is a factor that has frequently been overlooked in discussions of unemployment statistics. The fact that the unions in a particular trade report that 30 per cent of their members were unemployed on a certain day should not be construed to indicate that 30 per cent of their members were not working, but that 30 per cent were not engaged at their principal occupation. This defect in trade union statistics of unemployment is due to the fact that the secretary of a local union estimates the percentages of unemployment with the idea that the information which is most desirable is that relating to the number of members who are unable to secure employment under the jurisdiction of the union.

Statistical information as to unemployment among the members of the Pattern Makers' Union is available for each month since April, 1907. These data have been secured from the reports of the local union secretaries to the national president who compiles the statistics for private use and for publication.¹⁹ The secretaries are instructed to "give the exact number of members unemployed at the end of the month"²⁰ and the membership of the local unions. These statistics are, of course, open to the same criticism as those of the New York Department of Labor and Massachusetts Bureau of Labor, but they are greatly superior to the statistics collected by trade unions that have heretofore been considered. In January, 1915, forty of the sixty-five local unions of the Pattern Makers had less than fifty members each.²¹ As was stated above, the secretaries of local unions with few members are able to determine the number of unemployed from personal knowledge. Moreover, several of the larger unions, two of which comprise over 20 per cent of the entire membership, pay out-of-work bene-

¹⁹ The writer wishes to express his appreciation of the kindness of President Wilson of the Pattern Makers in placing at his disposal the reports from which these data have been obtained.

²⁰ Monthly Financial Statement and Trade and Statistical Report, December, 1914, p. 2.

²¹ Ibid., January, 1915, pp. 6, 7.

fits,²² and all of the local unions furnish out-of-work stamps free to the unemployed,²³ so that their secretaries, unlike those of most unions, have the opportunity of ascertaining the exact number of unemployed members with but little difficulty. The president of the union, too, takes great interest in the returns and where a local union attempts to conceal a good condition of trade by the return of an exaggerated number of unemployed, does not hesitate to correct the error. However, President Wilson states that, although the greater number of unions make fairly accurate returns, some associations overestimate the number of unemployed for the purpose of deterring the traveling members from transferring to them. Thus, in January, 1915, he pointed out that "one association this month reports that 20 per cent of its members are out of work while the truth is that all of its members are employed, and another union reports just about three times as many as are really idle."²⁴ As with the other data as to unemployment in trade unions, these figures include those unemployed from all causes.²⁵

The following table shows the percentages of unemployment in the Pattern Makers' Union for the last working day of each month from April, 1907, to December, 1916:

UNEMPLOYMENT OF MEMBERS OF THE PATTERN MAKERS' UNION
(From Reports at the Union Headquarters)

Year	Percentage of Membership Unemployed on Last Working Day												
	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Mean
1907				3.8	5.5	4.9	4.9	6.8	9.8	12.5	20.6	29.3	10.9
1908	28.6	29.4	28.1	22.6	27.1	26.4	25.6	23.7	22.5	21.7	17.1	16.7	24.1
1909	15.3	14.1	10.2	12.1	11.8	10.6	8.2	7.3	6.5	6.0	6.2	5.6	9.5
1910	4.8	3.9	5.5	4.3	4.4	5.1	5.5	7.8	8.1	11.1	10.6	11.3	6.8
1911	10.5	8.1	7.6	7.6	9.3	6.9	7.2	8.2	8.1	10.1	10.1	9.1	8.6
1912	7.4	6.3	6.5	5.2	5.0	4.9	4.6	4.5	4.3	3.8	3.8	4.8	5.1
1913	4.6	3.8	3.9	4.2	6.2	7.4	9.3	11.4	11.8	12.9	15.1	16.6	8.9
1914	14.0	12.5	11.9	11.3	11.6	13.1	12.8	15.6	20.3	23.8	23.9	19.9	15.9
1915	20.4	16.5	14.9	13.1	11.8	10.9	8.3	7.8	8.3	7.0	5.7	5.7	10.9
1916	5.8	6.8	6.3	6.6	6.5	5.6	6.0	6.6	7.1	5.9	4.7	3.9	5.2

²² See p. 144.

²³ See p. 145.

²⁴ Monthly Financial Statement and Trade and Statistical Report, January, 1915, p. 2.

²⁵ In 1916 an average of 16.8 per cent of the members reported as unemployed were on strike.

It will be noted that the percentages are considerably lower than those of the other unions so far noted. In normal years the percentage of unemployment is between five and eight, but these figures are doubled in periods of industrial depression. The striking fact about the data of the Pattern Makers is the relative constancy of the figures from month to month; that is to say, the percentages show no sudden fluctuations from one month to the next as the unemployment statistics of a single trade generally do, but either rise or fall gradually during the periods of depression and prosperity. Thus, in 1915 the percentage was 20.4 in January and only 5.7 in December, but the percentages for the intervening months decreased gradually. The same slow movement of the percentage of unemployment occurred in 1907 when there was a gradual increase from 3.8 in April to 29.3 in December. This regularity in the returns probably indicates that the secretaries were more careful than in other unions to note slight fluctuations.

One of the most important conclusions to be drawn from the statistics of unemployment relates to the very great differences in the amount of unemployment among localities. The dominant industries of any two States are rarely the same, or even if the same, the proportions of workmen employed in the various industries are generally different. It is certainly true, for example, that the chief occupations of the workmen included in the Massachusetts returns are not identical with those of the workmen represented in the New York data. Even where the industries are the same in two States certain local peculiarities may affect the seasonal fluctuations and produce more unemployment in one state than in another.

The differences in unemployment among various States is illustrated by a comparison of the monthly fluctuations in the number of persons employed in manufactures. The census of manufacturers of 1909 shows that in ten States the minimum number of wage earners reported for any month in the year represented over 90 per cent of the maximum

number. In thirteen States the proportion was less than 80.0 per cent. The largest difference between the maximum and the minimum numbers employed is shown for Idaho, where the percentage was 63.3. This was due chiefly to the seasonal variations in the lumber industry which gave employment to more people than any other industry. In New Hampshire and Vermont, on the other hand, where the fluctuations in the various industries largely balance one another, the minimum numbers of wage earners reported were 94.3 and 93.3 per cent respectively, of the maximum numbers.²⁶

The following table shows the relative fluctuations in unemployment in New York and Massachusetts. The percentage of fluctuation is calculated upon the base of the greatest number employed in any one month of the year:

**MONTHLY FLUCTUATIONS OF EMPLOYMENT IN THE INDUSTRIES OF
NEW YORK AND MASSACHUSETTS, 1909**

(From the Thirteenth Census of the United States, 1910, vol. viii;
Manufactures, p. 282)

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Mean
New York	10.1	8.7	6.8	6.9	7.5	7.8	8.1	6.1	2.1	—	0.4	1.7	6.02
Mass.	7.6	6.6	5.4	5.8	5.9	6.0	6.5	5.2	2.9	1.8	1.4	—	5.01

The table shows that not only was there a greater fluctuation between the best and worst months of employment in New York than in Massachusetts, but that in New York the average of the other eleven months was 6.02 per cent less than in the busiest month, October, while in Massachusetts the average was only 5.01 per cent less than in December, the busiest month. In eight of the eleven months the percentage of fluctuation was over six in New York, while in Massachusetts the percentage was six or over in only four months.

Not only are the fluctuations in employment in the industries of two States taken as a whole often quite different,

²⁶ Thirteenth Census, 1910, vol. viii, p. 282.

but it frequently happens that the seasonal fluctuations in the same industry are different in two States. This arises chiefly out of climatic conditions although various local peculiarities play a large part. Thus, when the state of employment in the building trades of New York City is poor, Philadelphia may be erecting a number of large buildings and may need additional workmen. Indeed it may be said that the state of employment in certain trades is affected more by purely local variations than by seasonal and cyclical fluctuations. It will occasionally happen that in a particular city more building will be done during the winter than was done in the preceding summer. Even taking the labor market as a whole, the state of employment varies as much from one city to another as it does from one season to another. This fact is shown by the reports of the Massachusetts Bureau of Statistics on the state of employment in the various cities of the State. In March, 1915, for example, the percentage of unemployment for the entire State was 16.6; in Boston, it was 13.9, in Brockton, 27.6, in Holyoke, 25.2, in Lowell, 7.4, while in Quincy and Taunton it was only 4.1 and 4.7, respectively.²⁷ Thus, there was a total range of 23.5 from one city to another in the same State. The reports of the New York Department of Labor show that the state of employment is generally far worse in New York City than in other parts of the State.

The difference in the amount of unemployment among cities is illustrated by the statistics of "traveling" among trade unionists. Workmen do not move from one city to another because the general state of employment in their trade is poor, but because it is poor in the particular community in which they reside. It is true that some twenty years ago trade unionists traveled needlessly from one local union to another, but in consequence of the change in the attitude of the unions, the members are notified of the condition of trade in contiguous cities before they move, and if it appears to the secretary or business agent that the

²⁷ Twenty-ninth Quarterly Report on Unemployment in Massachusetts, March 31, 1915, p. 4.

UNEMPLOYMENT AND TRAVELING IN THE PATTERN MAKERS' UNION

Year	Month	Percentage Unemployed	Number of Members per 1,000 Transferred
1909	January.....	15.3	9
	February.....	14.1	15
	March.....	10.2	12
	April.....	12.1	17
	May.....	11.8	17
	June.....	10.6	16
	July.....	8.2	22
	August.....	7.3	24
	September.....	6.5	25
	October.....	6.0	28
	November.....	6.2	26
	December.....	5.6	15
1910	January.....	4.8	22
	February.....	3.9	18
	March.....	5.5	19
	April.....	4.3	26
	May.....	4.4	33
	June.....	5.1	29
	July.....	5.5	26
	August.....	7.8	28
	September.....	8.1	22
	October.....	11.1	21
	November.....	10.6	15
	December.....	11.3	16
1911	January.....	10.5	15
	February.....	8.1	11
	March.....	7.6	19
	April.....	7.6	21
	May.....	9.3	23
	June.....	6.9	19
	July.....	7.2	20
	August.....	8.2	19
	September.....	8.1	23
	October.....	10.1	36
	November.....	10.1	18
	December.....	9.1	12
1912	January.....	7.4	13
	February.....	6.3	20
	March.....	6.5	18
	April.....	5.2	21
	May.....	5.0	23
	June.....	4.9	24
	July.....	4.6	31
	August.....	4.5	27
	September.....	4.3	33
	October.....	3.8	23
	November.....	3.8	17
	December.....	4.8	22
1913	January.....	4.6	22
	February.....	3.8	19

UNEMPLOYMENT AND TRAVELING IN THE PATTERN MAKERS' UNION
(Continued)

Year	Month	Percentage Unemployed	Number of Members per 1,000 Transferred
1913	March.....	3.9	18
	April.....	4.2	23
	May.....	6.2	25
	June.....	7.4	21
	July.....	9.3	23
	August.....	11.4	18
	September.....	11.8	19
	October.....	12.9	14
	November.....	15.1	13
	December.....	16.6	12
1914	January.....	14.0	11
	February.....	12.5	10
	March.....	11.9	17
	April.....	11.3	13
	May.....	11.6	10
	June.....	13.1	16
	July.....	12.8	12
	August.....	15.6	13
	September.....	20.3	10
	October.....	23.8	7
	November.....	23.9	8
	December.....	19.9	9
1915	January.....	20.4	8
	February.....	16.5	10
	March.....	14.9	10
	April.....	13.1	12
	May.....	11.8	13
	June.....	10.9	17
	July.....	8.3	13
	August.....	7.8	21
	September.....	8.3	17
	October.....	7.0	16
	November.....	5.7	20
	December.....	5.7	18

member would not be bettering his chances of employment by transferring his residence, the workman is informed of the fact. The trade unionists, as will be shown in a later chapter, are relying more and more upon their unions to notify them of employment in other cities and consequently the movement that occurs at the present time is largely due to differences in the demand for labor in various cities. It has frequently been asserted in periods of depression that

the poor condition of trade forced many workmen to move from one city to another, but the contrary is true. This is clearly brought out by comparing the percentage of unemployment and the number of transfers issued per one thousand members in the Pattern Makers' Union, as shown in the table on pages 26 and 27.

The coefficient of correlation between the number unemployed and the number transferred is $-.70$. In other words, the percentage of unemployment varies inversely with the percentage of transfers issued. As unemployment increases, the number of workmen transferring from one city to another decreases, and vice versa. The percentage of transfers is governed by the fluctuations of employment between individual labor markets.

From the statistics of unemployment we are also able to make certain deductions as to the relative volume and character of unemployment in some of the principal trades. Cyclical fluctuations occur with some degree of regularity, the movement covering a period of four or five years. Thus, 1896, 1900, 1904, and 1908 were years in which the percentage of unemployment reached very high marks. These cyclical fluctuations affect all trades and industries. It appears that a depression generally causes an increase at the high point of 50 per cent over the number normally idle. Thus, in Massachusetts it appears that there was, on the average, 61 per cent more unemployment in 1908 and 1904 than in the intervening years while in New York there was, on the average, 50 per cent more unemployment in 1908 and 1914 than the average of the intervening years. The number unemployed does not register the full effect of a depression since short-time is more common in such periods. The amount of the weekly pay-roll would be a better measure, but the data are not obtainable. Industrial depressions affect the various trades in different degree. For instance, a period of depression causes an increase of 100 per cent in the number of unemployed in the building trades, while it causes increases of only 30 per cent in the

garment industry, 40 per cent in food and liquors, and practically none in some other trades and in public employment.

There are two methods by which the trade unions can alleviate the consequences of unemployment due to cyclical fluctuations: (1) distribution of employment and (2) unemployment insurance. It is obvious that the unions can of themselves do nothing to regularize industry. In periods of depression, their employment bureaus cannot have any great value, nor can they place their members in other occupations, because industries are generally affected. Equal distribution of employment and unemployment insurance appear to be the only means of meeting cyclical fluctuations. But, as will be pointed out in a later chapter, various forces operate against the establishment of the system of equal distribution of employment. Thus, in transportation and printing where a period of depression throws out of employment only about four per cent of the workmen, this number is not large enough to cause the unions to ask for an equal distribution of the work. The system is most used in those trades where the cyclical and seasonal fluctuations are the most violent. In the building trades, however, where the workmen change frequently from one employer to another, this method can be utilized only with great difficulty.

The most noticeable characteristic of the statistics is the wide fluctuation in the percentages of unemployment from month to month. In the New York data, which constitutes the only statistical information as to unemployment from month to month in all trades, the percentages for all trades taken together gradually dropped from January, the dulllest month in the year, to September and October, and rose again in November and December. The good and bad seasons vary from one trade to another. Thus, the winter months furnish less employment in building trades and transportation, but more employment in clothing, textiles, boots and shoes, theatres and music. The differences among the various trades of the same industry are equally as im-

portant. For instance, in the garment industry, the dull seasons in dresses and waists coincide with the periods of fairly intense activity in the manufacture of petticoats. While the seasons of activity and dullness may be in general the same in some of the various industries, the duration and the intensity of the unemployment may be different. In the clothing industry the seasonal fluctuations are the greatest, for in some of its trades there is an almost complete stagnation in the dull season. On the average, it may be said that the dull season affects 80 per cent of the workmen in the clothing industry. In the building trades the fluctuations due to weather conditions mean the idleness of 20 per cent of the workmen in addition to the number normally idle. In metals and machinery and printing, the seasonal fluctuations are less, amounting to but three or four per cent of the workmen. In the brewing industry the seasonal fluctuations mean the employment of all workers on half time, while in theatres about 75 per cent of the workmen are unemployed during the summer months.

> There are two chief remedies recommended for seasonal fluctuations: (1) the regularization of industry and (2) the dovetailing of occupations. While it is true that the trade unions could facilitate the regularization of industry by lowering their minimum rates in the dull seasons, there are certain considerations which make this solution undesirable to them. Moreover, this solution can only be achieved by cooperation with the employers.

The second remedy, the dovetailing of trades, has greater possibilities, although the trade unions have given it little attention. In a later chapter, it will be pointed out that only a few of the unions have provided for a free interchange of union cards. It was noted, however, in our examination of the statistics of the Flint Glass Workers union, that nearly one-half of those not engaged at their principal occupations were employed at other work. In this problem, as in others, the volume and character of the unemployment determine to a great extent the appropriate rem-

edy. It is obvious that the amount of dovetailing will be greatest in those trades where the slack seasons are most pronounced. The flint glass workers, the theatrical stage employees, and the glass bottle blowers, who realize that they will be unable to secure any employment at their main occupation during the dull seasons, look to other industries for employment to tide them over the slack period. On the other hand, where the fluctuations are less pronounced, and there is a greater chance for continued employment in the trade through the slack season, the workmen are reluctant to enter other industries and perform work which is more irksome for lower wages. This explains in great part why the longshoremen rarely enter other fields of employment even for short periods; there is always the chance that they can secure some work along the wharves.

In another group of trades, workmen are unable to dovetail occupations because there are no opportunities. The coal miners have no means of supplementing their earnings in dull seasons, and charity workers will testify to the fact that clothing workers are usually unable to secure work at other than the needle trades. Skilled workmen are reluctant to do unskilled work for fear that they will in some way destroy the knack of doing skilled work; it is only in a small number of cases that building trades workers secure employment in other occupations with somewhat lower wages. Thus, the extent to which resort is had to subsidiary occupations varies from trade to trade. In trades where the seasonal fluctuations are more pronounced, a considerable part of the number not employed at the trade are employed in some other occupation. In the highly skilled trades and in trades where the fluctuations are not very acute, the number is very much less.

The consequence of seasonal unemployment to the individual workmen may be alleviated by unemployment insurance, by relatively higher wages during employment, and by distribution of employment.

It has been noted that the periods of seasonal fluctuations

in many trades are well defined, and the workmen expect to be unemployed for a certain length of time each season. Unemployment insurance, in such cases, is not necessary unless the workmen have not the will to provide for these periods of idleness. It will be noted later that the Cigar Makers do not provide for the payment of out-of-work benefits during the seasonal periods of slackness.

It is a well recognized fact that wages are higher in trades which are affected by pronounced seasonal fluctuations than in trades embracing the same class of workmen but with greater regularity of employment. Thus, the hourly wages of bricklayers are considerably higher than the wages of carpenters; but the statistics of the New York Department of Labor show that the average yearly earnings in the two trades are about the same. Cabinet makers receive lower wages than carpenters partly, if not entirely, because they have more regular employment. The relatively high daily wages of members of building-trades unions are frequently used to indicate high yearly earnings, yet it is found that the latter are but little more than those in metals and machinery and slightly lower than in printing, where regular employment produces high yearly earnings although the daily wage is relatively low.

In a later chapter it will be shown that the unions depend chiefly upon the distribution of employment in meeting seasonal fluctuations, and that the volume and character of the unemployment play a considerable part in determining whether or not this method is available.

Apart from seasonal and cyclical unemployment there is a considerable amount of unemployment in certain trades which is due to the maladjustment of the labor supply among different localities. Against this form of unemployment, the unions have provided by the transfer of their members from one city to another. These methods are generally better established in trades where the local fluctuations are the greatest.

Finally, there is the form of unemployment which is

present at all times, caused either by a chronic oversupply of workmen in the trade or by the fact that workmen are sometimes forced to change their employers. The former cause is of importance only in those trades where the work is extremely casual as in the case of longshoremen. In this connection the unions have done little; indeed Barnes²⁸ points out that the unions of longshoremen in New York City have repeatedly refused the offers of the employers to place a certain number of the men on weekly wages.

The second form of unemployment, that due to the changing of employers, is of great importance in some trades, while in others it is not a serious problem. More time is lost in this manner in the building trades than in any other industry. The average building-trades worker secures employment on several jobs and under several employers during a season. Inasmuch as the periods of unemployment in such cases are generally short, unemployment insurance is of little value. The most important need is for employment bureaus. In a later chapter it will be noted that the unions have developed these agencies in proportion to the relative volume of such unemployment in their trades. Thus, in the building trades where the problem is the greatest, the office of business agent has been established. In other trades, as, for instance, the glass industry, where the problem is far less acute, the unions have done very little.

²⁸ Charles B. Barnes, *The Longshoremen*, pp. 74, 79, 102.

CHAPTER II

THE TRADE UNION THEORY OF UNEMPLOYMENT

The American unions have adopted certain policies which have as their object a solution of the problem of unemployment. Some of these policies are based on fallacious reasoning, while others would produce a partial solution if the unions were able to exercise jurisdiction over a greater proportion of the working population than they now control. No one realizes the inadequacy of present policies better than the trade unionists, and they also realize that without the aid of the government, of the employers, and of the general public, they cannot deal successfully with the problem. As one trade-union official has said: "Of all the problems facing trade-union officials that of unemployment is the most difficult to handle."¹

There are numerous union rules, regulations, customs, and policies which bear some relation to unemployment, but only those which show the union theory of unemployment will be considered here. Inasmuch as this theory has been developed from two main ideas, the regulation of the number of workmen among whom the employment is to be divided, and the increasing of the total amount of employment, the policies which have been chosen for discussion may be conveniently classified under these two heads.

Unions generally regard the amount of work which is to be done as a fixed quantity. Their chief concern, therefore, is the number of workmen among whom the employment is to be divided. The problem of unemployment would be, in great measure, solved, in their opinion, could they but regulate the number of workmen in the country and in each trade. Thus, the unions have been the strongest

¹ Typographical Journal, January, 1915, p. 42.

agitators for a restriction of immigration. They maintain that as the population of the country increases the chances for employment lessen and there is less amount of employment per capita. In the same manner they appear to think that by the abolition of the manufacture of goods by convict and child labor the per capita amount of work will be increased. In short, the union theory of unemployment is built upon the doctrine which economists have termed the "work fund" theory.

In view of the existence of such union theories, it is not surprising that a great number of unions have placed restrictions upon the admission of workmen to their organizations. The editor of the *Bridge and Structural Iron Workers Journal* has stated the common union view as follows: "As a general proposition with us we appear to think that a new applicant means another person to apply for the various jobs."²

Not all of the unions have adopted the policy of limiting their membership; many are willing to receive as members practically all who are employed at the trade. But, where a local union has the field sufficiently organized to successfully deal with the employers, very little effort is made to secure additional members. In some of the large cities it is very difficult to obtain admission to a building-trades union. In such cases it is felt that workmen have the local situation so well in hand that the presence of even a considerable number of unorganized workmen can have little influence in their dealings with the employers.

A few local unions in various trades make their admission fees high as a barrier to deter the unorganized from joining. Initiation fees of \$50.00, \$75.00 and even \$100.00 are found in a few highly organized unions, and this amount must be paid before the workmen are given their working cards. Another method of keeping the unorganized out of the union is to make the conditions of the examination such that it is very difficult for ordinary workmen to pass it.

² Bridgemen's Magazine, 1908, p. 848.

The New York local union of Steam Fitters limits its membership by this method. The requirements of the examination are said to be of such a nature that a majority of the members of the union could not pass it. Other unions have gone further and have absolutely refused to consider applications. While this is a policy of only two or three national unions, it is practised in a great number of local unions of various trades. These local unions have a sufficient number of members to maintain relations with the employers and are extremely reluctant to receive any new members, even upon application. A still greater number of local unions do not make any serious efforts to organize their trade. Thus, a business agent informed the writer that he made no effort to secure new members and, further, that he attempted to persuade applicants not to join the union unless work was very plentiful.⁸

The union apprenticeship policies are dominated by the same ideas. The unions seek to perpetuate the custom of apprenticeship with its accompanying rules, primarily, in order that the supply of labor may be regulated and, secondarily, that capable workmen may be produced. Although there is no desire to minimize the purpose of the unions to produce efficient workmen by the system of apprenticeship, it is obvious that this is subordinate to the desire to restrict the number working at the trade. In those trades in which the system of apprenticeship exists, a considerable amount of unemployment is frequently traced by the unions to the admission of too many apprentices. Thus, an official of the Photo-Engravers reported in 1915: "We fully agree that one of the chief contributing factors that have been the cause of so much unemployment in our trade has been a too liberal apprentice ratio which is turning out more journeymen than the trade can absorb. The industry is not growing as rapidly as it has in the past and the new time and labor saving methods and processes are aggravating this situation. . . . We therefore . . . urge this convention to alter our

⁸ Interview, February, 1913.

existing ratio of apprentices so as to be more restrictive."⁴ Trade unionists generally believe that if the unions were allowed to fix the ratio of apprentices to journeymen, the problem of unemployment would be greatly lessened. Thus, the president of the Plumbers said in 1900: "I believe that the future prosperity of our trade lies in restricting the vast number of apprentices that are at present employed. The supply is greater than the demand and therefore in accordance with the other lines of trade we should endeavor to restrict the number of apprentices until such time as our older members have an opportunity to earn a livelihood."⁵ In the majority of trade conferences, such as those in the glass industry, the subject of apprenticeship is one of the most important topics of discussion. The unions demand that the ratio be reduced while the employers desire an increase. Frequently the unions have laid as much stress upon this point as upon wages and other working conditions.

The relation between restriction of numbers and the avoidance of unemployment is illustrated by the policies of certain unions when trade is very active. In such cases the unions occasionally remove the barriers to membership in order to furnish employers with the desired number of workmen. They receive these men into the union upon the payment of the customary initiation fee, but are careful to accept as members only enough to meet the demands of the employers. In other cases the unions do not accept as regular members those workmen who are needed by reason of an increased demand. For instance, the Elevator Constructors, which has limited its membership more successfully than any other American union, utilizes the so-called "permit" system. A Chicago contractor stated in 1904 that "in busy times the Union (Elevator Constructors) will not admit new members so that all of its members, even the poorest, may be able to obtain employment," and that this resulted in a shortage of efficient men.⁶

⁴ American Photo-Engraver, October, 1915, pp. 467-468.

⁵ Proceedings, 1900, p. 15.

⁶ Eleventh Special Report of the Commissioner of Labor, 1904, p. 333.

When a local union of the Elevator Constructors is forced by the employers to find additional workmen, it secures men who have had experience in elevator construction, or structural and ornamental iron workers, machinists, carpenters, and electricians. The work is of such a character that under the guidance of experienced elevator constructors these workmen of closely allied trades can be utilized very satisfactorily. But these men are not required to join the union. Indeed, in the greater number of cases they are not admitted. They are given "permits" which are valid for one or two weeks. If their services are needed after this time the permits are renewed, but if employment is not plentiful the men are released. For these permits the union charges the sum of 25 or 50 cents per day. The rules of the Chicago local union provide that "when the condition of trade makes it impossible to furnish employers with the necessary help from among the regular members, the business agent shall have power to issue permits to the members of other trades who may be competent to do the work. These permits may be withdrawn at any time by the business agent."

President Murphy of the Elevator Constructors says that in 1912 the New York local union was working three hundred and fifty permit men at one time.⁸ Nor are the fluctuations which require additional men of short duration. The secretary reported in 1908 that the Philadelphia local union had had an average of twenty-five permit men for two months, and added: "now that trade is dull, the permit men are being dispensed with to make room for the regular members who are out of work."⁹ When asked as to the union's motive in using the permit system to such an extent, President Murphy stated that the main reason was the desire to maintain the number of members at such a point that all would be steadily employed throughout the year.¹⁰

⁷ Constitution, 1914, art. 8, sec. 16.

⁸ Interview, August, 1915.

⁹ Elevator Constructor, 1908, p. 23.

¹⁰ Interview, August, 1915.

Partly on account of the great seasonal fluctuations, partly as a result of the policy of equal distribution of employment during the dull seasons, and partly on account of the fear of prohibition and local option laws, the Brewery Workers also use the permit system.¹¹ During the summer a large force of extra workmen is needed in all breweries. By reason of the policy of the union respecting the restriction of membership, the supply of workmen is not sufficient to cope with this extra work. The union, which has practically complete control of the trade, has been given the power to designate the workmen to fill all vacancies. Accordingly, the union secures unemployed members of other unions, generally from those trades which experience seasonal unemployment during the summer months. The character of the work is such that no previous experience is required. These additional workmen are given permits which are revocable at any time on demand of the business agent. The fees charged the permit men are the same as the dues paid by the regular members.

In the Flint Glass Workers there has been a shortage of mould makers on frequent occasions since 1901. Inasmuch as the periods during which a scarcity of men has existed have been of short duration, the union has refused to allow the employers to increase the ratio of apprentices to journeymen. As a substitute, President Voitle of the Flint Glass Workers in 1902 advised that the manufacturers be permitted to employ members of the Machinists' union to do patching. Such workmen, however, were not to become members of the union, but to pay the regular assessments on their earnings. Furthermore, the permits of the machinists were to be revoked not later than June 30, 1902.¹² It appears that this proposal was not adopted as a general rule, although it was put into practice in several shops.

In 1904 the manufacturers again complained of a scarcity of mould makers and it was proposed that members of the Machinists' Union be given permits to do this class of

¹¹ Interview with Secretary Proebstle, August, 1915.

¹² Proceedings, 1902, pp. 60-61.

work. President Rowe in speaking of the proposition said:

"I believe that if we extend relief to the bottle-mould shops where it is badly needed at the present time, we should carefully measure the number required to furnish the relief necessary, and we should confine that relief for one or two years to the common grade of work. If at the expiration of the period of one or two years, we are unable to fill the places with mould makers competent to do the work, we should then teach the trade to the machinists with permits, and when they become competent workmen we should admit them to membership. I favor this plan in preference to admitting more apprentices. If we admit more apprentices we will have them on our trade at all times, owing to the fact that they have learned no other trade. We should arrange specifications whereby the machinists could be put off in case of slackness in trade and they would have another trade to go to in case it was best for the interests of the workers to have them put off."¹³

The permit system was put into operation by the Flint Glass Workers in many factories, but it was not until 1914 that a general rule was adopted. The convention of that year made the following provision: "In the case of a shortage of mould makers and the American Flint Glass Workers' Union is unable to supply the men within a reasonable period of time . . . the shop committee shall have the privilege of drawing labor from the International Association of Machinists, and all those engaged under such circumstances shall pay assessments into our Union and comply with our rules, with the distinct understanding that labor drawn in this manner, if working at a time when work becomes slack, shall be the first to be laid off before there is a division of time."¹⁴

In the building trades the permit system is in operation in a great many local unions. The Bridge and Structural Iron Workers issue permits to sheet metal workers, metal lathers, and boiler makers when there is a scarcity of union iron workers. The Carpenters frequently allow so-called "hatchet-and-saw" men to work on permits during the busy season and the Plasterers obtain "handy-men" to aid them in their work. The local unions of Chicago and New

¹³ Proceedings, 1904, pp. 133-134.

¹⁴ Proceedings, 1914, p. 193.

York have been the chief centers of the permit system. It is common knowledge among unionists that at one time it was extremely difficult to obtain membership in any of the building-trades unions of Chicago and New York.

The Steam and Hot Water Fitters have utilized the permit system in various forms. President Short of the Building Trades Department said in 1911 that "the conditions in Chicago at the first of the year were such that it was deemed advisable for the United Association of Plumbers to organize a local union of steam fitters, as theretofore it was impossible for a journeyman steam fitter to obtain admission into the organization to which he should belong. Instead of being given membership in the Steam Fitters' Union he was compelled to work under a so-called permit system. His permit would be renewed from week to week and a certain fee was charged for it."¹⁵ While the present steam fitters' local unions of the United Association of Plumbers do not arbitrarily refuse to admit efficient journeymen into the union, they do use the permit system for helpers, and to a certain extent, for journeymen. When there is a scarcity of journeymen steam fitters, the union issues journeyman permits to its most efficient helpers, and in turn issues permits to handy men to take the places of the helpers who have been temporarily promoted. Such permits are revocable at the desire of the business agent. When work becomes dull, the permit journeymen are reduced in rank to helpers and the permit helpers are given their release. The fees charged the helpers on permit vary from 25 to 50 cents per day, while the regular helper pays only \$1.30 per month. A business agent of the Steam Fitters said he attempted to secure each season as helpers on permit men who had worked in this capacity before, and generally the men who have worked on permits return the next season for the same privilege.¹⁶

A great part of the jurisdictional disputes among the

¹⁵ Proceedings, Building Trades Department of the American Federation of Labor, 1911, p. 37.

¹⁶ Interview, December, 1915.

unions is directly attributable to the "work fund" theory. Each union strives zealously to increase its jurisdiction, since the members expect thereby to increase their field of employment and thereby to increase the per capita amount of work for the members. But the unions carry this idea further. It is a well known fact that a great number of workmen are capable of working at more than one trade. Such men would be able to greatly decrease their periods of unemployment by transferring from the trade in which they have been thrown out of work to a trade in which they could secure work. When, however, a member of a union attempts to transfer either for a short period or permanently to another union, he is compelled, with few exceptions, to pay the same initiation fee as an unorganized workman.¹⁷ Very few unions allow the interchange of cards. The only exceptions appear to be the reciprocity agreements between the Bricklayers, Masons and Plasterers and the Operative Plasterers, the Western Federation of Miners and the United Mine Workers, the Maintenance of Way Employees and Carpenters, the Carmen and the Painters, the Glass Bottle Blowers and the Flint Glass Workers, and to a limited extent, the Ladies' Garment Workers and the United Garment Workers. A member of the Commercial Telegraphers, for example, is not recognized by the Railroad Telegraphers although the work performed by the members of both organizations is practically the same, and there is much transferring between the two industries.¹⁸

Those unions which are organized on the basis of industry, instead of trade, furnish the most flagrant examples of this situation. The work of the members of the Stationary Firemen and Steam Engineers is the same as that performed by some members of the Brewery Workers, the Western Federation of Miners, and the United Mine Workers. But, there is no permanent interchange of cards between these organizations. A member of the Teamsters cannot secure employment at his trade in the brewing or

¹⁷ The Bridgemen's Magazine, December, 1903, p. 5.

¹⁸ Interview, August, 1915.

mining industries until he withdraws from the Teamsters' Union and joins the Brewery Workers or Miners. When one considers the number of industries in which the average mechanic works during a year it is obvious that the industrial union form of organization, unless some change were made in present rules, would be less adapted to combat the problem of unemployment than the trade union. Under a system of organization by trade, a member of a union is free to work in any industry provided that he is employed at his customary trade, but the field of employment of a member of an industrial union is limited to one particular industry.

From time to time in various unions, some of whose members have been capable of working at more than one trade, or in more than one industry, there have been campaigns for reciprocal recognition of the cards of certain unions. During the past few years a number of such agreements have been made. Some unionists have gone further and advocated a Universal Card System, under which a union card would be accepted by a local union in any trade, provided that the initiation fees of both local unions are the same. The chief argument advanced by the promoters of the reciprocal agreements between particular unions and of the Universal Card System has been that when a workman is compelled to change his occupation he is generally in need of funds, and this is a most inopportune time for him to pay an initiation fee. Certainly the fact that he is compelled to pay a new initiation fee has forced many a workman to relinquish the hope of securing employment under the jurisdiction of another union.

In some unions there exists the practice of granting seniority rights and privileges to certain members. Under this system when employment slackens, those members who have been longest employed are given preference by being employed at full time while other members are laid off. The system of seniority rights exists, to a certain extent, in many unions, but only in the Railroad Brotherhoods and in the Printers is it in general practice.

The Typographical Union established its priority rules in 1892. These provided that the oldest competent substitute should have the first vacancy and when the working force was to be decreased such decrease was to be accomplished by discharging first the person or persons last employed. Furthermore, when an increase in the force was desired, the persons displaced should be reinstated in the reverse order in which they had been discharged.¹⁹

This rule has been attacked from the outset. The objections made to it have been summarized by Professor Barnett as follows: (1) The power of men of superior efficiency to secure employment in preference to workmen of fair skill is greatly lessened. (2) The incentive to high efficiency on the part of the employee is lessened. (3) The employer is less likely to pay superior workmen more than the minimum rate, for, if they leave his service, they must begin at the bottom of the list in some other office. (4) The distribution of work is curtailed, for the foreman is unwilling to permit inferior men to "sub," for they would thus acquire priority rights in the office. (5) The mobility of labor is decreased, for a substitute with priority rights in one office cannot accept a situation in another office without losing his rights in the first.²⁰

The defenders of the priority rule claim that it was established to guarantee equality of rights; that before it became effective situations were given out regardless of the seniority of candidates for vacancies; that under it a situation holder is secure in his position, while the first substitute in the office is assured in time of promotion to a position as regular; that it prevents members who are subbing from securing situations through favoritism; and that it tends to reward long and faithful service.²¹ At various times there

¹⁹ Proceedings, 1892, p. 135.

²⁰ George E. Barnett, "The Printers: A study in American Trade Unionism," in *American Economic Association Quarterly*, third series, vol. 10, no. 3, p. 241.

²¹ George A. Stevens, "The History of Typographical Union Number Six," in *Annual Report of the New York Bureau of Labor Statistics*, 1911, Part 1, pp. 529-530.

have been efforts to abolish the system, but each time the attack has failed. The New York local union in 1908 pointed out that the priority rule "has had a fair chance to prove its merits in New York City and we are firmly convinced that a continuance of its enforcement will prove disastrous to the Union."²²

It appears that the system has undergone considerable changes which its promoters did not anticipate. President Lynch said in 1911 that "there has been a gradual and determined application of the priority rule in a broader and broader sense until the danger-point has been reached, and in many jurisdictions it is not now a question of competency which determines the man for a particular position but a question of priority. The priority law has been in countless instances a great protection of our members, but instances are also on record where priority laws have been used to protect the incompetent to the demoralization of the composing room and to the discredit of the local union."²³

In the various Railroad Brotherhoods seniority rights and privileges are in effect. The men are classified in certain groups in order of seniority, and the men last taken on are not entitled to any work until the men in the various groups are receiving runs totaling a certain number of miles. Thus, in periods of depression the young men are placed on the extra list and receive employment only after those with greater seniority rights earn a certain amount of money per month. This system has led to considerable discussion in the Brotherhoods, but the older men appear to be firmly entrenched and the younger men, realizing that some day they will have the same priority rights as the older men now enjoy, do not strongly object. In some cases the system has led to gross inequalities in employment. Thus, it was said in 1915 that one-fourth of the total membership of the Locomotive Engineers were "extra" men, and that during the previous seven years on a certain division of the North-

²² Ibid., p. 530.

²³ Reports of Officers and Proceedings of the Fifty-seventh Session, 1911, p. 39.

ern Pacific Railroad, the "extra" men did not average over \$75.00 per month, while those with greater seniority rights averaged \$175.00 per month.²⁴

Some unions have gone farther than acquiring seniority rights for the trade over which they have jurisdiction, and have created rights in subsidiary trades. Thus, when it becomes necessary to reduce the number of locomotive engineers on the engineers' working lists, those thus taken off who have been promoted from the ranks of firemen in any seniority district, may, if they so desire, displace any fireman who is their junior in that seniority district.²⁵ It is said that during the depression of 1914 one third of the engineers on some railroads took the places of firemen, who in turn displaced "hostlers."²⁶

The American unions have attempted to solve the problem of unemployment also by the adoption of policies of another kind, which, it was thought, would tend either to increase the total amount of employment or to distribute the employment over a greater number of their members. Such policies are (1) restriction of output, (2) shortening of the normal day, and (3) regulation of overtime.

The policy of restriction of output is justified by a number of unions as a method by which employment may be increased. The desire to "make the work go round" is prevalent chiefly in trades which experience extreme seasonal fluctuations, and where the output is restricted in order to "make the seasons longer." The instances of union regulations for the systematic restriction of output are not very numerous, despite the fact that the inducements to adopt such policies are very great. Fifteen years ago, a number of unions provided in their constitutions for a restriction of output, but only a few have maintained such policies to the present time. The force of public opinion and the increasing disinclination of the employers to

²⁴ Locomotive Engineers' Journal, January, 1915, p. 36.

²⁵ Chicago Joint Agreement between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, May 17, 1913, art. 11.

²⁶ Locomotive Engineers' Journal, March, 1915, pp. 224-225.

bargain with the unions that openly declared for restriction forced these unions to abandon such policies. Two of the most glaring and, perhaps, most important illustrations of restriction of output which are sanctioned by the national unions, are those of the Printers and the Machinists.

The Typographical Union prohibits the loaning, borrowing, purchase or sale of news matter in type, linotype, matrix or plate form, or of miscellaneous matter or cuts in small forms between newspapers of a city. Furthermore, the loaning, borrowing, exchange, purchase or sale of matter or matrices, or cuts of advertisements, by one local newspaper to another is prohibited, except that when the matrices of advertisements are furnished by one local newspaper to another, the text shall be reproduced within one week from the time of publication as nearly like the original as possible, made up, read, corrected, and proofs be submitted to the chairman for inspection.²⁷ This rule has been characterized as "job making" of the most despotic sort, and, although some justification has been attempted for the rule which requires the resetting of advertising matter, a great many of the members of the union criticize the rules on the ground that the only reason for their enforcement is the desire to "make work."

The International Association of Machinists in 1901, prohibited its members from operating more than one machine.²⁸ The one-man-one-machine rule, however, is not operative when the machines require no special skill to supervise them or are double machines. This rule had its genesis in an unwritten law which prevailed in the trade before the organization of the machinists. And indeed, many employers do not now object to the rule when it is applied to establishments which make large machinery, because in these establishments two machines cannot be effectively operated by a single workman. However, in shops making smaller work, the rule operates as a restriction of output, for often one man is capable of operating more than

²⁷ Constitution, 1915, sec. 168.

²⁸ Constitution, 1901, art. 22, sec. 2.

one machine. Thus, while the one-man-one-machine rule of the Machinists is justified in a great number of cases, there are other instances where its operation is merely a method of "making work." The union explains that the purpose of the rule is the physical protection of the workman, but it seems clear that this is not the only motive. An officer of the union said in 1901: "We prevented the introduction of the two-machine system in 137 shops, employing 9,500 men, and it is safe to say that if this system had been introduced the force of men would have been reduced one-eighth; hence, in this we have saved the positions of 1,188 men."²⁹

These two examples are by no means the only instances of restriction of output in American unions. Thus, a curious regulation of the Plumbers for increasing the consumption of time is the prohibition upon its members of "the use of the bicycle and motorcycle during working hours."³⁰ A business agent when asked for the justification of this rule stated that "a plumber could cover twice as many jobs that way." The Baltimore local union of Plumbers prohibits its members from telephoning to the employer when they are "out jobbing to know if there are any more jobs in the neighborhood."³¹

In the majority of trades there are unwritten regulations for the determination of the daily "stint." And, in the greater number of cases, they have been handed down from one generation of members to another. They are not incorporated in any constitutions or working rules, but there is a tacit understanding among the members as to what constitutes a day's work. Frequently these restrictions exist to the same extent among non-unionists in the same trades.

However, there are frequent instances where local unions have formulated definite schedules under which the output has been restricted. Thus, in May, 1899, the Chicago local

²⁹ Eleventh Special Report of the Commissioner of Labor, 1904, p. 143.

³⁰ Constitution, 1913, sec. 125.

³¹ Working Rules of Local Union, Number 48, 1914, art. 12.

union of Plumbers adopted a set of working rules which specified the amount of work which was to be considered a day's work. When a journeyman was working on lead work, eight wiped joints should constitute a day's work, and "when finishing on flats, apartments, hotel or office buildings, one fixture shall be considered an average day's work, except in the case of laundry tubs, when each apartment shall constitute one fixture."⁸² The outcome of the adoption of these rules was a general lockout in February, 1900, and this device for restricting output was abandoned, although President Kelley of the Plumbers stated that the rules were formulated in order to prevent "rushing."⁸³

To sum up, it may be said that policies of systematic restriction of output do not exist to a great extent in American unions. Generally speaking, those rules which are in force have not been dictated by selfish or sectional class interests alone, but by the desire to prevent a speeding up of the workmen which threatens physical injury. It is not desired, however, to minimize the importance of that aspect of the problem which has to do with the desire to "make the work go round." It is generally admitted by unionists that this is an important motive for the maintenance of such policies. The ever-present fear of being thrown out of work leads the workmen to reduce output in order to make the work last as long as possible.

It is very doubtful whether restriction of output affects to any extent the amount of unemployment. If restriction were applied only in seasons of depression, such might be the effect, but restriction of output on the part of individual workmen generally occurs in periods of prosperity. The employers maintain that in busy times men work at a more leisurely pace than they do in dull times, and the reason for this difference is obvious. When every member of the local union is employed and there is need for additional workmen, some workmen do no more than is absolutely neces-

⁸² Report of the Industrial Commission, 1901, vol. 8, p. 407.

⁸³ *Ibid.*, p. 966.

sary because they do not fear immediate discharge. On the other hand, however, when only two-thirds of the trade is employed, the other third being idle but anxious to secure work, the workmen who have employment will exert themselves to do all they can, knowing that many unemployed men are waiting for any vacancy that may occur.

Closely linked with the policy of restriction of output, as a means of partially solving the problem of unemployment, is the union policy of decreasing the working hours of the normal day. Unionists and unorganized workmen have, at all times, demanded the reduction of the hours of labor. While the unorganized workmen have not succeeded as well, the unions have, to a very considerable extent, secured the eight-hour day.⁸⁴

The unions, in their demands for a shorter working day, have developed their argument along two lines. For the benefit of the employers and the general public, the unions offer as exhibits, the case of those members employed at hazardous occupations which require uninterrupted attention in order to guard against physical injury, and that of the workmen employed at tasks which consist of performing the same operation several thousand times during the day. They depict such workmen returning home, after working ten or more hours, physically exhausted. They demand for their members such working conditions that there may be "eight hours for work, eight hours for rest, and eight hours for what we will." It is argued that the increased productivity which will result from the shortening of the working day will more than compensate them for the increase in the hourly wages. On the other hand, the unions frequently offer a different explanation to their members of their desire for the shorter day. They are told that to decrease the working hours is the one sure way to solve

⁸⁴ Of the 21,165 union members reporting to the Wisconsin Federation of Labor in 1913, 11,552, or 54.6 per cent had secured a normal working day of eight hours or less. The average daily working hours for the entire number was $8\frac{3}{4}$ ("Labor Conditions in Wisconsin," Second Report by the Executive Board of the Wisconsin State Federation of Labor, July 1, 1914, p. 13).

the problem of unemployment. Thus President O'Connell of the Machinists said in 1901: "There are 150,000 machinists in this country, and an hour taken off their day's labor would give employment to 16,666 more machinists."⁸⁵ Thus the problem would be solved. The average workman, who has been working ten hours a day, appears to believe this. He thinks that if his normal day were reduced from ten to eight hours, his output would certainly not be the same, and thus work would be furnished for his unemployed fellow members. This aspect of the question makes a great impression upon the workman. It is said that during a discussion of the eight-hour day at union meetings, references to the opportunities for study and for more recreation which a shorter work day would bring, result only in a modicum of applause, while a word picture of the horrors of unemployment rarely fails to elicit the tumultuous appreciation of the audience.⁸⁶

Such illustrations are not fanciful. The American Federation of Labor has adopted, according to an expositor, the principle that "the movement to reduce the hours of labor is not to shirk the duty of toil, but as the humane means by which the workless workers may find the road to employment."⁸⁷ The Plumbers provide in their constitution that eight hours shall constitute a normal working day, and explain that "inasmuch as the business throughout the country is insufficient to furnish employment to more than 50 or 75 per cent of the journeymen, and recognizing that by reducing the hours of labor it will have a tendency to keep more men employed, the Saturday half-holiday is recommended to all local unions."⁸⁸ President Kelley of the Plumbers in 1900 set forth the union theory of the shorter working day in its barest form as follows: "When our members decrease the number of working hours of a given day it simply means that more of them will be provided with

⁸⁵ Machinists' Journal, April, 1901, p. 199.

⁸⁶ Isaac H. Mitchell, "The Unemployed Problem," in *The Nineteenth Century*, July, 1905, p. 117.

⁸⁷ *The Bridgemen's Magazine*, January, 1910, p. 9.

⁸⁸ Constitution, 1913, secs. 118-119.

employment, and as a consequence, as we relieve the market of its unemployed surplus, we simply provide for the unfailing operation of the law of supply and demand, and through this means make possible the inevitable demand that will be created for our labor."³⁹

The Painters at their convention in 1913 adopted the following resolution: "Inasmuch as the average painter is employed not more than seven or eight months in a year, and as the only permanent remedy for this condition lies in the proportionate shortening of the working day, we instruct the Executive Board to do all in its power to put into substantial effect the six-hour day."⁴⁰ Secretary McGuire of the Carpenters and Joiners as early as 1888 said that "by reducing the hours of labor we are furnishing employment for our unemployed"⁴¹; and the Editor of the Bridge and Structural Iron Workers' journal probably stated succinctly the union's belief when he said: "Trade unions shorten the hours of labor to place more men at work."⁴²

While a great number of trade unionists still hold this belief in the effect of the eight-hour day on unemployment, some of them have changed their former attitude. In 1898 President Gompers of the American Federation of Labor stated that "in every industry where the hours of labor have been reduced through the efforts of organized labor, it has been followed by these results: wages have been increased, periods or seasons of employment have been lengthened and the number of unemployed has been reduced."⁴³ But in 1915, in "The Philosophy of the Shorter Working Day," he says that "the individual production of the short-hours, highly-paid worker is vastly greater than that of the long-hours worker."⁴⁴ If this is accepted as true, no employment has been created for those out of work. Likewise, the attitude of President Duncan of the Granite Cutters has under-

³⁹ Proceedings, 1900, p. 14.

⁴⁰ Proceedings, 1913, p. 631.

⁴¹ Proceedings, 1888, p. 18.

⁴² Bridgemen's Magazine, March, 1914, p. 149.

⁴³ Leather Workers' Journal, September, 1898, p. 4.

⁴⁴ American Federationist, March, 1915, p. 167.

gone a considerable change. Writing in 1909 he said: "It was to help in the elimination of poverty that organized workmen agitated for a reduction of the working hours per day, and the fact that they now enjoy a shorter work day gives employment to many who, under the old method, would be idle, and each person so employed is a step in the trade union campaign against poverty."⁴⁵ But in 1914 he stated that the reduction of the hours in the Granite Cutters from ten to nine, and then to eight, had neither lengthened the seasons of employment nor given work to those unemployed.⁴⁶

Trade unionists have, in the past few years, come to realize that not only is their explanation of the effect of a shorter working day on unemployment false in theory, but that it did not work in practice. With but few exceptions, the officials and members admit that the eight-hour day has not decreased unemployment. The explanation is made that the individual production is the same in both cases. President Gompers of the American Federation of Labor has stated that "there has been no diminution of output by reason of the reduction of hours from ten to eight. In not a few cases the output has not varied from the results of ten hours, the number of human workers remaining the same in proportion."⁴⁷ It is only in the building trades that the workmen still claim that the output in an eight-hour day is less than under the ten-hour day, and here in a few trades, especially those of the plumbers and the painters, it appears that this is true.⁴⁸

⁴⁵ Bridgemen's Magazine, January, 1910, p. 14.

⁴⁶ Granite Cutters' Journal, August, 1914, p. 2.

⁴⁷ Brauer-Zeitung, March 25, 1911, p. 1.

⁴⁸ For an account of the results which have been obtained in several large establishments through a reduction of the working hours from ten to eight per day, the reader is referred to a most instructive article, "The Eight-Hour Day," by C. J. Morrison in the Engineering Magazine, December, 1915, pp. 363-366. Mr. Morrison shows that manufacturers have limited their working day to an eight-hour basis without diminution of output; indeed, in some cases, more goods were produced under the eight-hour day and at lower costs. For other accounts of the results of the operation of the eight-hour day, the reader is referred to Thomas K. Urdahl, "The Normal Day

The question of the regulation of overtime is closely connected with that of the shortening of the normal day. When a union has secured a reduction of working hours, it is extremely reluctant to allow its members to work overtime. A member working overtime is looked upon as receiving employment which should be given to those out of work. Thus, President Woll of the Photo-Engravers deprecates the "unjust practice of some of the members who work excessive overtime while others are denied the opportunity of employment."⁴⁹ The Cincinnati, Ohio, local union of Bricklayers and Masons explains that its members are prohibited from working overtime because "the object of regular hours is to afford work for as many as possible."⁵⁰

In order to discourage the employers from resorting to overtime, the unions have demanded that a wage rate considerably higher than that paid for work performed during the normal day, should be paid for all overtime. Generally, "time-and-half" is asked, although in certain cases overtime is paid for at "double-time." A few unions have gone further and prohibited their members from working overtime, except under certain circumstances. Thus, the Granite Cutters provide that "overtime is not to be worked except in cases of emergency, such as the spoiling or breaking of stone, delay in quarrying large sizes, where a stone is required to finish a building or where an accident has happened."⁵¹ The Metal Polishers prohibit members from working overtime unless all vacancies are filled, and then only when overtime is absolutely necessary.⁵² The Spinners prohibit members from working overtime under any circumstances.⁵³

The emphasis laid upon the restrictions on overtime as

in Coal Mines," in the Proceedings of the First Annual Meeting of the American Association for Labor Legislation, 1907, pp. 50 et seq., and to the American Labor Legislation Review, March, 1914, pp. 106, 107 and pp. 117-119.

⁴⁹ American Photo-Engraver, October, 1915, p. 469.

⁵⁰ Constitution, 1912, art. 9, sec. 9.

⁵¹ Constitution, 1912, sec. 95.

⁵² Constitution, 1913, art. 35, sec. 8.

⁵³ Proceedings, 1913, p. 9.

a means of increasing employment is further illustrated by the rules of certain unions which provide that when a member works overtime, he shall at some future time lay off an equal amount of time. The Printers have formulated a rule, known as the "six-day-law," which prohibits its members from working more than forty-eight hours per week, if a substitute is available. Should a printer, through inability to secure a substitute, work a greater number than six days in any one week, or whenever his overtime aggregates eight hours, he is forced to give the first available substitute the opportunity to work the exact number of hours which his accumulated overtime amounts to. The local unions are allowed to specify the period during which this extra time is to accumulate, provided that it is not less than thirty days.⁵⁴

The Railroad Brotherhoods limit the mileage or earnings of members when other members are unemployed. The engineers, for example, who are on "work-lists" are placed in one of three classes, (1) pooled or chain gang freight, (2) extra road, or (3) extra switching. In the busy season the men are transferred from one list to another to suit the demand. The crews in each class are given runs in the order in which they arrive at the terminal from previous runs, and so long as the men in the various classes are securing regular employment and there are none unemployed, they are not limited to a certain amount of work. But when the earnings of some men exceed a certain amount, while others who rightly belong in that class are unemployed, or are receiving less than a certain amount, a limit is placed upon the individual members. Thus, those in pooled or chain gang freight service cannot average more than three thousand miles per month; those on the extra road list are limited to the equivalent of twenty-two hundred miles per month; and those in extra switching service are not allowed more than twenty-two days work in a month. The result of these rules is that whenever the

⁵⁴ Constitution, 1915, sec. 105.

average earnings exceed the various amounts while there are members unemployed, a sufficient number of workmen must be added to the list to bring the earnings within the proper limit.⁵⁵

While one of the motives for the regulation of overtime in all unions has been the desire to give work to the unemployed, there has also been present in the seasonal trades, the idea that a regulation of the working day would tend to shorten the seasons of unemployment. Especially has this been the case in the building trades. President Duncan, of the Granite Cutters, for many years has exhorted the local unions to abolish all overtime, and thus force the employers to give up the custom of rushing the work in summer in order to close down the entire plant in winter.⁵⁶ In the building trades, even during periods in which there are few unemployed, the local unions are generally unwilling to have their members work overtime.

The actual results of the abolition of overtime in lengthening the working season have been entirely contrary, in the greater number of cases, to what was expected by the unions. The unions have failed to understand that even if less were produced in the eight-hour day than in a longer working day, the natural tendency would be for the employers to increase their working force rather than the length of the season. In the building trades, for instance, were the employers unable, through the shortening of the normal day and the abolition of overtime, to complete their building operations in the customary season, they would be forced to employ more men. And inasmuch as all of the building trades mechanics are generally employed during this season, the employers would recruit their forces by securing workmen from other industries. Such workmen would, therefore, be thrown upon the industry in the majority of cases, and would have to be taken care of in the dull seasons.

⁵⁵ Chicago Joint Agreement between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen, May 17, 1913, art. 11.

⁵⁶ Granite Cutters' Journal, February, 1914, p. 4.

CHAPTER III

LOCAL UNION EMPLOYMENT BUREAUS

There is a great need in every industrial community for some agency through which the demand for and the supply of labor can be adjusted. On account of the seasonal fluctuations of trades, the variations in the demands of individual employers in consequence of peculiarities of their markets, and the continuous changes in the personnel of the working force of each business unit, there is at all times more or less maladjustment. The employment bureau is justified when there is unemployment due to the inability of employers to get into contact quickly with the unemployed who are capable of meeting their requirements.

In descriptions of the existing employment bureaus of the United States the activities of the trade unions have generally been omitted or given minor consideration. This is due either to the fact that the proportion of workmen who are organized is small, or that the majority of the trade-union employment bureaus are not merely employment bureaus. Furthermore, one cannot learn of the activities of the unions in this connection by a study of their literature. Many trade unionists when asked whether their union maintains an employment bureau will answer in the negative although their particular union may possibly have a very practical method of securing work for its members. The difficulty lies in the fact that there is prevalent the idea that an employment bureau is an office with card indexes and an attendant who is entirely occupied in registering the names of the unemployed and receiving applications for workmen from employers. The trade unionist thinks it only natural that his business agent should secure work for him when he is unemployed. This, he considers, is one of

the principal benefits of the union, but he does not term such an agency an employment bureau.

It is obvious that the need for an employment bureau varies in the different trades. In those trades where the period of employment is relatively long, as in the printing trade, the glass industry, and the various railroad trades, there is little need for local employment bureaus. The maintenance of a business agent in such trades would ordinarily be uneconomical. The business agent is peculiarly the product of the building trades unions. The need for such an official is great in these trades because of the short term of employment.

Inasmuch as the local union generally provides for bringing unemployed members into connection with the proffered employment, the national unions have given little consideration to the question of local-union employment bureaus. The only exceptions appear to be the Ladies Garment Workers,¹ the United Garment Workers,² the Lithographers,³ and the Cigar Makers,⁴ all of which require their local unions to "establish labor bureaus for the purpose of designating work to the unemployed." In the constitutions of the local unions there are seldom found any provisions for the maintenance of employment bureaus because this is considered to be one of the essential functions of the unions, which it is unnecessary to particularize.

It may be said that the average member of a union in search of employment secures help from his local through one or more of the following sources: (1) the business agent or secretary, (2) the shop collector, (3) fellow members.

In practically every organized trade there are some local unions which provide for the employment of an official who is paid a salary sufficient to permit a capable member to give his entire time to the duties of the office. Such officers are

¹ Constitution, 1914, art. 12, sec. 2.

² Constitution, 1912, art. 13, sec. 2.

³ Constitution, 1913, art. 11, sec. 1.

⁴ Constitution, 1912, sec. 131.

known as business agents or secretaries. The maintenance of such an office entails the expenditure of a considerable sum of money. The salaries of business agents vary from \$20.00 to \$50.00 per week, while the average is perhaps \$30.00, and there are incidental expenses of \$5.00 per week. A local union expends, on the average, about \$1900 a year for a business agent. It is obvious that only those local unions which have a considerable membership can afford this expense.

In a few cases the expense of maintaining business agents is shared by the national unions. Thus, the Machinists assist local unions in maintaining business agents in any city "if after due investigation it is found that the interests of the organization warrant the expense."⁵ The Pattern Makers in 1913 assisted several of its local unions to support paid representatives,⁶ and the Blacksmiths for many years have subsidized all local union business agents by paying one-half of their expenses.⁷ In the Molders the expense of maintaining the business agents of the twenty-two Conference Boards is partly met by a subsidy of five cents per capita per month and in some cases by an additional sum.⁸ The Teamsters, Metal Polishers, Brass Workers, and several other unions help to defray the expenses of the local-union business agents when the unions are in need of assistance. Frequently, several local unions of allied trades no one of which would be able alone to support a business agent, together maintain a paid representative. This occurs generally among the building trades in small cities.

It is found that the majority of local unions which maintain business agents are either in the building trades, or if in other trades, those of large membership. In 1915, 320 local unions of the Carpenters and Joiners maintained business agents. The Chicago local unions had 29 agents, while New York had 16, Boston, 12, and Philadelphia and San

⁵ Constitution, 1913, art. 10, sec. 1.

⁶ Proceedings, 1913, p. 14.

⁷ Interview with Secretary Kramer, August, 1915.

⁸ Constitution, 1914, art. 20, sec. 6.

San Francisco each had 7. In the Painters, there were 275 local unions which employed business agents, the Chicago branch maintaining 15. Of the 760 local unions of Machinists, 47 had business agents. Thirty-seven of the 345 local unions of Boilermakers, 69 of the 118 branches of the Bridge and Structural Iron Workers, 23 of the 35 local unions of Elevator Constructors, and 45 of the 90 local unions of the Pattern Makers also employed representatives in 1915. Of the other unions, the majority have business agents in the large cities and in the industrial centers of their particular trades.

The duties of the business agent are varied. Generally speaking, he acts as treasurer of the union; he visits the different jobs to see that all those working at his trade are "paid up" members; he settles disputes between the members and the employers, interprets the rules of the union, and acts as an employment agent. Thus, as one of the duties of the business agent of the New York local union of bookbinders, it is provided that "he (the business agent) shall keep a record containing the names of the unemployed reporting for work and he shall find where men are wanted and adopt the speediest methods of notifying said members of such vacancies."⁹ The business agent of the Baltimore local union of bricklayers and masons is required "to use all honorable means to procure work for the unemployed and to visit all builders and contemplative builders and endeavor to secure their work for the members of the union."¹⁰

While the activities of business agents have probably received more criticism than those of any other union official, it is no doubt true that the agent is of great real benefit to the organized workmen. The average business agent is a well-informed man. He is on the alert at all times to secure employment for the members of the union. While his primary object is to make every job a union job, it is in

⁹ Constitution, 1903, art. 5, sec. 6.

¹⁰ Constitution, 1909, art. 10, sec. 7.

consequence of this desire that he is efficient in supplying employers with workmen. His primary occupation is to learn of developments in his trade. He knows the condition of every job within his jurisdiction, the prospects for the future employment of his members, and the immediate chances for securing work at each job.

Let us consider, for instance, the activities of a business agent in the building trades. In the morning before the members begin work he spends an hour at his office in order to take care of any employment which the employers may have to offer. Then he spends a part of the day in visiting the various buildings on which his members are employed. He consults the employers and the foremen as to their need for workers. He secures from the architects a list of prospective building operations and visits the contractors or owners. Thus he learns of practically every opportunity for the employment of members of the union.

The business agent does not, like the average employment-bureau official, wait for employment to be offered, but makes a survey of the field and applies direct to the prospective employer. Furthermore, he is far more efficient than the average employment-bureau agent in that he is a specialist. He knows his own trade perfectly; he knows the ability of each of his men and his characteristics; and he appreciates the peculiarities of the employers and the conditions surrounding the various jobs. He considers these conditions before he recommends one of his men to an employer. On the other hand, the ability of an official of an employment bureau to cater to any particular trade is limited. He is forced to deal with more than one trade and as his knowledge of each is limited his selection of men is more or less haphazard. No amount of questioning by the employment agent can produce a knowledge of those peculiarities of the individual workmen which the business agent, through long association, has discovered, and an acquaintance with which is so useful to him in selecting workmen for particular jobs.

The Chicago business agent of the Pattern Makers thus explains why employers apply to the union for men:

"The business agent knows his men and can furnish a more satisfactory man than the employer can hire at the door of his factory by taking men as they come. Our members in their application for membership to the union and every time they send in an application for work, must state in the application the class of work that they are used to and how long they have worked at that class; besides, we get confidential reports from other sources upon the special aptitude and ability of our members. The union officials claim that, being practical pattern makers themselves and having this line upon their men, they are more capable for selecting the men for a given kind of work than the employers themselves, who, while excellent business men, are not practical workmen. We give them the best men we can get for their line and we never send a man to a shop to do work that he can not do, if we know it."¹¹

While the business agent spends the greater part of the day in visiting the various jobs and shops where his members are employed, he also has his office hours. These are known to the employers and to the members of the union. The latter generally loiter around the union headquarters in order to secure any employment which the business agent may have to offer. Some local unions have gone further and designated certain periods of the day during which applications will be received for the different classes of workmen. Thus the Chicago Bakers and Confectioners, in their 1914 agreement with the employers, secured a provision that all bakers must be secured through the union's employment bureau, which would be open all day. But "steady hands" must be asked for during the hours of ten to twelve, and "hands" on cakes between one and two o'clock, while substitutes were to be had at all times. Because of the fact that the employer can secure a competent hand on a few hours' notice, the union is frequently called upon to furnish workmen. The employer calls the business agent by telephone and asks for a certain kind of workman. Generally, the desired man can be found among those waiting about the hall, or one can soon be notified by means of the telephone number which each man on the unemployed list gives to the business agent, and the employer is furnished the

¹¹ Regulation and Restriction of Output, Eleventh Special Report of the Commissioner of Labor (Washington, 1904), p. 188.

desired workmen within a short time. This is practically impossible in the case of any other employment bureau. It has been stated by the Chicago employers of union pattern makers that they receive their men through the union as a matter of choice because "it is much easier to telephone to union headquarters for a man than to get one in any other way," and further that "the union does try to send a man best suited to the needs."¹²

It is obvious that the ability to secure a workman on an hour's notice is very convenient to employers. Consider for instance the case of bakers. When the shop starts to work it may be found that several "first hands" are absent on account of sickness or other cause, or that it is necessary to provide for extra orders. In such cases the employer requires the services of additional men within one or two hours, and the union's employment bureau is usually able to meet the requirement.

But the business agent goes further than merely receiving applications for men, and sometimes adopts ingenious methods of securing employment for his constituents. He scans the want advertisements of the press in hope that there may be found opening for his members. He secures publicity by advertising that employers may secure workmen from him on a few hours' notice by merely telephoning to his office. By means of such methods many odd jobs are filled. Thus, the business agent of the Memphis, Tennessee, Carpenters and Joiners' local union reported:

We send out one thousand circulars each month for the purpose of refreshing the memory of our clients that we are still able to furnish them mechanics. It is one of the good features of this office that we secure a great number of small jobs from merchants. The merchants themselves are pleased with this arrangement as it saves them a great deal of trouble. The instances where our members secured employment through this office during the past year amounted to twelve hundred. Another point worth mentioning is the assistance rendered other trades by this office. Frequently we receive calls for painters, plasterers and men of other crafts, and as it helps us as well as others and serves to make this institution more useful and popular we are only too glad to oblige them in this respect.¹³

¹² Ibid., p. 189.

¹³ The Carpenter, February, 1906, p. 4.

It is obvious that by requiring the employers to apply to the union for labor, the union makes its employment bureau more efficient. Such a course has been pursued more or less successfully by the Bakers, Barbers, Brewery Workers, Deutsch-Amerikanischen Typographia, Lithographers, Photo-Engravers, Flint Glass Workers, and Potters. Of course such a policy can only be enforced where the union has thorough control of the trade; but where this method is practiced the union employment bureaus are put on a more business-like basis.

As was stated above, the greater number of local unions are not financially able to maintain paid representatives. Such local unions, however, frequently appoint one of their members to perform the duties of a business agent during his spare time. He is generally the secretary or president. This official receives from the employers applications for workmen and confers with the employed members as to the prospects for work at the different shops. Frequently there is appointed in each shop or on each job where members of the union are employed a member who is designated the "shop collector," or in the building trades, the "steward." It is the duty of this member to represent the union and to acquaint himself with the prospects for employment. Should there be need for additional workers, it is his duty to make this known to the unemployed. At each meeting of the union, the various shop collectors or stewards make reports. The shop collectors and secretaries are of great assistance in securing employment for members. The employer knows that by applying to these men he will be supplied with the desired number of workmen more quickly and efficiently than by application to any other agency. Furthermore, these officials, like the paid representatives, are always on the alert to discover possible places of employment without waiting for applications from the employers.

Another source from which the union workman receives aid in securing employment is his fellow workers. One of the duties of a trade unionist is to procure work for his

unemployed fellow member. Thus, one of the duties of members of the Brotherhood of Carpenters and Joiners is "to assist each other to secure employment."¹⁴ A member of the Bridge and Structural Iron Workers¹⁵ or Bricklayers and Masons¹⁶ takes the following oath: "I will at all times by every honorable means within my power procure work for members of this union." At each meeting of a local union the president usually asks the following questions: "Are there any members out of employment?" and, "Does anyone know of any vacancies?" Generally, if there are any situations unfilled they are made known to the unemployed. Indeed, several local unions provide for the fining of those members who fail to notify the union of vacancies which are known to them.

The permanent headquarters of a local union offers a place where the unemployed can congregate and where those who are working can assemble after working hours. The importance of this feature of trade-union life must not be overlooked. It is here that all the members meet and talk over the conditions in the trade. Those who have knowledge of vacancies gladly, and one might say, proudly, convey such information to their fellow members. Prospects for the future are discussed and the trade gossip is canvassed. The usefulness of such meeting places has long been realized by the trade unions. As early as 1893, the Bricklayers and Masons advised the local unions to establish and maintain headquarters which would be open to the members at all hours of the day.¹⁷ During the past ten years other unions have followed this example, and at present practically every building-trades union and the greater number of other unions maintain such rooms.

One has only to spend a short time in the headquarters of a building-trades union to find that the members are fully cognizant of the local employment situation. The average

¹⁴ Constitution, 1914, sec. 3.

¹⁵ Constitution, 1914, p. 42.

¹⁶ Constitution, 1912, art. 12, sec. 4.

¹⁷ Proceedings, 1893, p. 113.

union carpenter, for example, knows of practically every job under construction and of the more important ones for which contracts have been awarded. Not only does he know the name of the contractor and general foreman, but that of the foreman whose duty it is to engage carpenters. There is no doubt that this lessens the work of the business agent. The workman does not ordinarily wait for the employer to apply to the union, but visits the foreman beforehand and tries to obtain a job. In many cases this is done while the man is still engaged upon a job which will terminate before work on the new building will be started. While this method of obtaining employment is generally termed "calling around," it is very different from the haphazard means by which the unorganized and unskilled workmen secure employment.

There exists in all unions the custom of "calling around." Having failed to secure employment through the union agencies described above, there remains the possibility of applying direct to the various employers. In some unions this method is facilitated by a printed list of shops or factories in which union members are employed. Generally, the business agent or secretary will indicate certain establishments at which there is the greatest chance for employment. But on account of the increasing efficiency of the union employment bureaus this custom is gradually disappearing. The workmen now realize that when the business agent, secretary and other members are not cognizant of any vacancies, there is small chance of finding employment. Consequently, this method, which was at one time the chief means by which workmen secured employment, is rapidly being supplanted by union agencies. In some unions it is held to be discreditable for a member to ask the employer directly for work. Among the Hatters it is the accepted custom that a member looking for employment must not apply directly to the employer but get another member who is working in the shop to apply for him. Foremen who hire hatters in violation of this rule are liable to

a fine of \$25.00.¹⁸ This rule also obtains to some degree among the Cigar Makers.¹⁹

The methods by which workmen are chosen for the vacancies which are reported to the union are of sufficient importance to be mentioned. There are three usual methods of determining which member shall be given the proffered employment: (1) place on the out-of-work list, (2) the decision of an official, (3) the drawing of lots.

There are two kinds of out-of-work lists, the compulsory and the optional. The former is found in comparatively few unions. Under this method the names of the unemployed are kept on a list in the order of the length of unemployment, that is, those who have been out of work the greatest length of time are placed at the head of the list. When the employer applies to the union for a workman the first man on the list is sent, and unless the employer can show that this man is unable to perform the work he is obliged to employ him. This rule is found in general practice only among the Miners and Brewery Workers, but exists in a great many local unions of other trades. It is obvious that such a custom can only exist in a strongly organized trade, and where there is comparatively little difference in the skill of the workers.

The optional out-of-work list is in general use in a great many unions. Upon application the out-of-work list is furnished the employer and he is allowed to take any man on the list. Of course, if he should merely ask that a workman be sent him, the man longest unemployed would probably be designated. Such lists are maintained by a great number of local unions of the Metal Workers, Hatters, Pattern Makers, Photo-Engravers, Bakers, Printers, Lithographers, Blacksmiths, Machinists, Coast Seamen, and of some national building-trades unions. The rules governing the out-of-work list of the Coast Seamen are as follows: The man first on the list is given the first chance at the

¹⁸ Interview with President Martin Lawlor, August, 1915.

¹⁹ Letter from the secretary of the Tampa, Florida, branch to the writer, Feb. 22, 1913.

vacancy. If he should not care to accept the employment, his name remains on the list in the same order, but if he should be absent from the roll call three consecutive times his name is removed to the bottom of the list.²⁰

The second method—the decision of an official—is more widely used. Generally when an employer applies to the union for workmen, he specifies certain requirements, or, as occurs in a great many cases, he asks for a particular man. If he asks for a certain man, this member if unemployed will be sent. If he does not, the business agent generally chooses the first man he can find who is able to meet the requirements. In the building trades if the men are wanted quickly, those loitering in the meeting room are chosen. In trades in which there is a high degree of specialization or if men with certain qualifications are wanted, the business agent generally takes into consideration all who are unemployed before designating the man to accept the employment. It is obvious that where time is not important this is by far the best method of choosing men. Indeed, as was said above, it is in this respect that the business agent excels the ordinary employment bureau officials.

It is to be admitted that by giving a union official the power of designating the person to fill a vacancy a fertile field for favoritism is opened, and disgruntled workmen have frequently asserted that the chances for securing employment depend more upon being a friend of the business agent than upon ability or the length of the period of unemployment. On the other hand, if the comparative periods of unemployment were the sole guide, much of the value of the business agent's service would be lost.

The third method of choice—the drawing of lots—is found in very few unions. Where practised a number of slips, on one of which is written the word "job," are placed in a hat, and the members draw the slips to determine which one is to apply for the job. This custom exists in a few of

²⁰ Letter from the editor of the Coast Seamen's Journal to the writer, October 25, 1915.

the local unions of the Cigar Makers and in some building-trades unions.

In certain building-trades unions no choice is made, but the information concerning employment is placed upon a bulletin board in the union headquarters. It is considered that by this means each unemployed member is given an equal chance to obtain employment. Under this method, it frequently results that many times the number of workmen desired apply for work.

If the trade-union member is unable through his union to find employment, there remains the possibility of securing work through application to state, commercial employers' and philanthropic employment bureaus, and through answering advertisements in the newspapers.

Since 1890, when the State of Ohio established the first state employment bureau, twenty-two other States have created such agencies, and more than twenty-five cities have formulated plans for aiding those out of work in securing employment. Of the twenty-three state bureaus more than one-half have been established since the financial depression of 1907. Although one of the reasons for their establishment was the desire to curb the evils of the private employment bureaus, a historical study shows that they have been created mainly in periods of industrial depression. These bureaus appear to a part of the public as one of the principal means of increasing employment in such depressions. States and municipalities are urged to establish employment bureaus and great efforts are put forth to insure their success. Soon after their establishment, and when business conditions improve, interest in the bureaus dies out and they either become merely registration offices for the down-and-outs and the unemployable, or are abandoned.

The actual results of the public employment bureaus have been well described by a recent investigator as follows: "In practice, far from supplanting private agencies, the free offices have not even maintained an effective competition against them. With few exceptions their operations have

been on a small scale, their methods unbusinesslike, and their statistics valueless, if not unreliable. Four States and about half a dozen cities have discontinued their offices and most of those now in operation are constantly on the defensive to maintain their existence."²¹ Under such conditions it is not surprising that the trade unions have not given their support to the public bureaus.

President Gompers of the American Federation of Labor traces the "persistent and widespread promotion in this country of the scheme for state and philanthropic employment bureaus to the transatlantic steamship combination and the great trusts." He says further that the necessity for the public employment bureaus arises mainly when the stream of immigration is directed to one locality or another to the benefit of the employers, and that the employers' profit comes through replacing union workmen by non-unionists and through substituting foreign cheap labor for unorganized labor.²² President Gompers appears to think that trade-union employment bureaus, advertising, and regulated private agencies are capable of supplying sufficiently the needs of the employers, and finds no reason for the establishment of public employment bureaus.²³ The convention of the American Federation of Labor in 1914 refused to endorse a resolution urging the creation of employment bureaus by States and cities.²⁴ President Furseth of the Coast Seamen stated during the consideration of the resolution that the existing bureaus have been a "never ending curse" and have always been placed in charge of those "who have no sympathy with the struggling toilers."²⁵

The attitude of the American Federation of Labor towards public employment offices is not unlike that of the English and German trade unions when public labor ex-

²¹ W. M. Leiserson, "Public Employment Offices," in *Political Science Quarterly*, Vol. 29, 1914, p. 29.

²² *American Federationist*, July, 1911, p. 514 et seq.

²³ *Ibid.*, July, 1911, p. 528.

²⁴ *Ibid.*, June, 1915, p. 31.

²⁵ *Proceedings*, 1914, p. 357.

changes were first established in those countries. Gradually the unions in those countries have come to realize that such bureaus are not inimical to their interest. Recently the unions have been granted some share in the management and have accordingly appeared less hostile, though they can hardly be considered even yet as sympathetic.

A few of the American trade unions have not objected to the establishment of public employment bureaus. The Printers at their convention in 1915 went on record as favoring them,²⁶ and the Maryland Federation of Labor has recently endorsed the movement.²⁷ Indeed, the Superintendent of the Illinois Free Employment Agency²⁸ said in 1901 that organized labor was largely responsible for the creation of that bureau, and Superintendent Dunderdale of the Boston Free Employment Office, states that "it was only through the influence of the trade unions that the law establishing the Free Employment Offices in this state was granted."²⁹ In some cases the unions have cooperated with the bureaus. Mr. Sears, superintendent of the Boston Employment Agency, said that the unions furnished the bureau with information regarding labor difficulties and that there had never been any trouble over the bureau's supplying the employers with strike breakers.³⁰

While it appears that the public bureaus in general have been of little value to skilled workmen, there are several which have done very efficient work during the past few years. Indeed, it appears that the trade unionists, while criticising the utility of the bureaus, have made some use of them. Thus, the report of the New York City Public Employment Bureau for the first twenty-nine days of its operation shows that of the 10,489 persons who applied for employment, 364, or nearly three and one-half per cent, were members of trade unions,³¹ while the Boston office of the

²⁶ Proceedings, 1915, p. 65.

²⁷ Proceedings, 1915, pp. 63, 67.

²⁸ The Bridgemen's Magazine, December, 1901, p. 182.

²⁹ Letter to the writer, February 25, 1916.

³⁰ American Labor Legislation Review, June, 1915, p. 284.

³¹ Ibid., p. 281.

Massachusetts Employment Bureau reported that of the 10,707 persons for whom it secured positions in the first year of its operation, 441, or more than four per cent, were known to be members of trade unions.³³ Of course, the trade unionists use the public bureaus less, because the chances of a skilled worker obtaining employment in this way are very much less than those of an unskilled workman.

It has been estimated that there are between 4,000 and 5,000 commercial employment bureaus in the United States.³⁴ The majority of these have as clients mainly domestic servants and waiters, and to a less extent girls and women in the unorganized trades. Only a few of them profess to secure employment for skilled workmen, while trades which are highly organized are rarely supplied by these agencies except in times of strikes. The trade unions regard private employment agencies largely as strike breaking bureaus and the activities of these offices furnish considerable proof of the soundness of the unions' contention. Moreover, several of the unions have experienced considerable trouble with commercial bureaus even at times when no strikes were being carried on. Thus, the Hotel and Restaurant Employees complain bitterly that its members who apply to such agencies in periods of industrial depression are not infrequently made to pay exorbitant fees for the promise of situations which do not exist.³⁵

The majority of trade unionists, especially those in the building trades, cannot hope to secure employment through the commercial bureaus because the few jobs which such bureaus have to fill are mainly non-union; and the general trade-union antipathy towards these agencies is such that they would be used only as a last resort. An exception seems to be the attitude of the Steam Shovel and Dredge Men. In its monthly journal there generally appear the advertisements of some twenty railroad labor supply agen-

³³ Quarterly Publications, American Statistical Association, June, 1909, p. 522.

³⁴ Final Report of the Commission on Industrial Relations, 1915, pp. 171, 172.

³⁵ Mixer and Server, September, 1915, p. 68.

cies in the West and Northwest. The secretary, however, explains that these agencies do not charge the members of the union fees, but merely act as the union's representatives and obtain their fees from the employers.²⁵

Within recent years the employers' associations in all the large industrial centers have established employment bureaus. These are supported by the employers and workmen are not charged fees. Although the directors of these bureaus claim that they have been established in order to supply the employers with workmen at all times, the majority of them owe their origin to the desire of the employers to establish and maintain the so-called "open shop." These bureaus are in most cases not active except in times of industrial strife and the motive for their maintenance is mainly to secure a weapon against the unions. Consequently, except in a small number of cases, the trade unionist cannot hope to secure any help from them.

In every city there are religious and charitable organizations which attempt to find work for the unemployed. The tendency during each period of industrial depression has been to multiply these agencies. Inasmuch as the main work of these philanthropic bureaus is to secure work for the unemployed who are not capable of holding ordinary positions the trade unionist is not likely to receive help from this source. Frequently the unions have protested against the wages at which such agencies have placed their applicants. In one case during the depression of 1914 a philanthropic bureau in a Mid-western city was accused by the trade unions of undermining the whole scale of wages in the city by sending men to work at cut rates.²⁶

There remains for the workmen the want advertisements of the newspapers. To unskilled workmen, professional workers, and domestic servants these are of some value, but the skilled mechanic and trade unionist can rarely use them to any advantage. A study of newspaper advertisements as a medium for securing employment shows that the trade

²⁵ Interview with Secretary Dolan, August, 1915.

²⁶ American Labor Legislation Review, November, 1915, p. 545.

unionist is seldom offered work at union wages and hours. Advertisements for carpenters, painters and other building-trades mechanics are frequently inserted, but the men are generally to be employed on non-union jobs. A study of the "help-wanted" columns of the Baltimore newspapers for several years resulted in finding less than a half-dozen opportunities for members of any trade union to secure work under union conditions.

In what has been said above the attempt has been made to show the superiority of the trade-union over other existing employment bureaus as a means of connecting the unemployed with employers in need of men. Not all of the unions have developed their resources to the full in this connection and accordingly the members of many unions are forced to rely upon other means of securing employment.

CHAPTER IV

UNION AGENCIES FOR THE DISTRIBUTION OF WORKMEN

In the same way that a workman is forced to move in a community from one employer to another, he may be forced to move from one local labor market to another because of the variation in the demands for workmen in the two local labor markets. Although a number of trades are affected in approximately equal degree throughout the country in periods of general business depression, there are other trades which are differently affected in different communities. Even in periods of industrial prosperity, the variations in demand among local labor markets are great enough to necessitate the transfer of many workmen. Given the fact that there is a scarcity of workmen in one labor market and a body of unemployed in another, there remains the problem of making known to the unemployed that there are opportunities for securing work elsewhere.

Some unions have considered it their duty not only to secure the employment which is offered in a community for the members who reside in that labor market, but when the demand for labor in a community is such as to require the services of additional workmen, to procure them from other places where some of their members are unemployed. Inasmuch as the methods of those unions which have attempted systematically to increase the mobility of labor cannot be successfully classified, it is necessary to describe separately the activities of the several unions.

Owing probably to the great local differences in the demand for workmen in the granite industry, the Granite Cutters' Union has probably the most effective method of adjusting inter-local supply to be found among American trade unions. During the past fifteen years the following

system has been maintained: When a local union is unable to supply from its members the number of workmen desired by the employers, the national union is notified. The general secretary immediately sends this information to the local unions nearest the locality. If it is found that the man cannot be obtained from nearby local unions, the information is printed in a "flier," with generally eight or ten other such announcements, and sent to every local union in the country. The information concerning each opportunity for employment is complete. The "flier" gives the employer, the kind of workmen required, that is, granite cutter, polisher or tool sharpener, the class of work to be performed, the number of men required, the working conditions and the length of time the men will be given employment. These "fliers" are generally issued weekly, but the period depends upon the variations in the demand among the different localities.

Unless the distances between the local unions in which men are unemployed and those in which men are needed are very great, there are few cases in which the employers are not supplied in a short time. The general secretary, besides notifying the trade of the opportunities for employment, also occupies himself in furthering the transference of the men required. Members are advised to telegraph or write to the employers before moving, and as this advice is generally followed, only the required number of men transfer. The employers have expressed their satisfaction with the system, and the union has succeeded in materially shortening the period of unemployment due to the need of transference from one locality to another, and has done away with a great deal of needless and haphazard traveling from one city to another.

The system of inter-local supply among the Glass Bottle Blowers had its origin in the introduction of the bottle machine. To operate the machine the services of expert pressers were required. The union did not have control over the class of workmen who were able to perform this

kind of work and therefore established an employment bureau in order to satisfy the demands of the employers. In 1903 a member who was an expert presser was appointed as chief of this bureau. The bureau seems to have given satisfaction, for President Hayes reported to the convention in 1905 that the employers had been furnished with 111 machine workers, which amply filled every demand for men of this class.¹

Having been so successful with the employment bureau for machine workers, the union decided to render similar services to other members. Accordingly, all unemployed members were requested to send their names, addresses and occupation to the national secretary. The local union secretaries and manufacturers who were in need of men were asked to notify the union. This extension of the bureau's services has been a distinct success, despite the fact that at times it has been impossible to induce the unemployed to transfer to places where work could be secured. The general secretary, upon receiving a request for men, sends telegrams or letters to those upon his unemployed list, and if this fails to procure the required number of men, the trade is notified by means of circulars. Also, each local-union secretary reports quarterly to the union the number of furnaces at work and idle, the number of members employed and unemployed, the number doing "spare" work, the number of men required and the number of men available for transfer. This information is classified and sent to the trade. Thus, there is available at all times, definite information as to the condition of trade in the various localities for the benefit of those members who are unemployed and are willing to remove to another locality. There appears to be little, if any, difficulty in inducing the local unions to notify the union of a scarcity of workmen, and the traveling members are generally given the same consideration as the local members when there is work to be had.

Another national union which has established an employ-

¹ Proceedings, 1905, p. 23.

ment bureau is the Flint Glass Workers. The demand for men in various localities varies so greatly in this trade that sometimes it has been very difficult to supply the employers with the required number. In the agreements between the union and the manufacturers the latter have demanded the incorporation of the following: "The union agrees to advertise for men free of cost, and to do its best to place men in the factory when needed."² The mode of procedure is for the local-union secretaries to furnish the general secretary with definite information as to the number of men required and the number of members unemployed. Those who are unemployed and willing to transfer to another locality file their applications with the union. The employers notify the chairman of the shop committees when they are in need of men and they in turn inform the general secretary, if the local union is unable to furnish the desired number. The general secretary immediately notifies those on the unemployed list who live nearest the locality in which the shortage of men exists. If this fails to supply the number of men required, the entire membership is notified through the official journal and circulars.

During the past few years the union has experienced considerable difficulty in supplying employers with all the men needed in certain branches of the trade. Especially was this the case with mould makers. The union through its trade letters, journals, and circulars, and through correspondence with the local unions in 1910, and again in 1912, attempted to reach the unemployed and induce them to transfer to localities in which there were shortages of mould makers. The places remained unfilled despite the activities of the union. It was clearly a case of unprecedented prosperity in this department of the industry, and the union's methods were not at fault. In the other branches of the trade, the union has generally been able to effect the needed transfers.

The custom of writing to firms in different localities for work became so general and produced such unfavorable re-

² Circular, Number 1, August 7, 1914, p. 2.

sults that the Lithographers in 1906 ruled that this method of applying for employment should be discontinued.³ As a substitute there was established an employment bureau under the direction of the general secretary. The unemployed were to send their names and qualifications to the bureau, and the local-union secretaries were required to notify the general secretary of any vacancies. Those first on the unemployed list and living nearest were to be notified by telegraph to apply for the positions or to notify the bureau that they did not care to accept them. Although there appears to be only a small number of transfers among the lithographers, the employment bureau performs its duties in this connection very adequately.

The Photo-Engravers' Union for many years was confronted with the problem which exists in so many trades, viz., the acceptance by members of positions in other cities without consulting the business agent of the union in the locality. There might be a sufficient number of men who were capable of filling the positions in the city, but the employer, for reasons of his own, preferred to obtain workmen from another city. There was thus an unnecessary and costly movement. The convention in 1906 established an employment bureau at national headquarters and adopted certain rules. It was made compulsory for members to write to local-union secretaries before accepting positions in another city. The unemployed were to register at headquarters. Local unions were required to notify the bureau of any vacancies and the employers were requested to file applications for workmen.⁴ During the first six months of the operation of the bureau 108 applications for employment and 109 applications for workmen were received. The secretary reported that the greater number of these positions had been filled, although it was impossible to give the exact number as the members did not always notify the bureau when the positions were accepted. It was then provided that when an applicant was notified of a vacancy, a blank

³ Proceedings, 1906, p. 193.

⁴ Proceedings, 1906, p. 61.

was to be sent him to be used for notifying the bureau whether or not he had accepted the position.⁵

From time to time improvements were made in the methods of the bureau and its usefulness was increased. In 1912 President Woll reported that the bureau "continued to be of great benefit to the members seeking employment," and likewise that "employers have been aided, and general satisfaction has been expressed by all those who have had occasion for its use."⁶ During the past few years the efficiency of the bureau has been increasingly higher. Writing to employers for positions, advertising or answering advertisements for employment, and applying to other agencies than the union's bureau have been discouraged. The employers have thus practically been forced to make use of the bureau; and they have expressed complete satisfaction with the manner in which they have been brought into connection with possible employees. The chief reason for the present efficiency of the Photo-Engravers' employment bureau has been this realization by the officers of the benefits that the union may derive from it. As President Woll said in 1915, "We should ever be ready to do all in our power to furnish union help whenever required, not simply because the employer wants it, but because it is a good business proposition."⁷

The Potters also keep a list of unemployed members at headquarters. The general secretary requires those who apply for employment to state their experience, the particular kind of work they have performed, and other pertinent facts. When an employer inquires for a workman, the secretary is able to give him a list of those who are able to do the work. The general secretary states that the employers do not hesitate to apply to the bureau for men, and that the system has been very satisfactory to the members and the employers alike.⁸

⁵ Proceedings, 1907, p. 46.

⁶ Proceedings, 1912, p. 24.

⁷ Proceedings, 1915, pp. 23, 24.

⁸ Letter of Secretary John T. Wood to the writer, October 25, 1915.

Through weekly reports made by the local unions of the Pattern Makers, the president is enabled to secure definite information of the state of the trade in each locality. The local secretaries report weekly the number of members employed and unemployed and the number of wood, metal, and plaster pattern makers wanted by the employers. These reports are classified and sent to each local union, thus enabling them each week to direct the unemployed to localities in which they can secure work. The president also attempts to supply directly the needs of employers from the list of unemployed members which is kept at headquarters, and telegraphs to those of the unemployed residing nearest the place where men are needed. These efforts coupled with the activities of the local unions adequately cover the field and in the majority of cases the employers are quickly and efficiently furnished with the necessary men.⁹ The Stone Cutters for many years had a system like that of the Pattern Makers. The local unions reported to the general secretary the state of trade and prospects and the number of members employed and unemployed. These were classified and sent to the various local unions. Since September, 1914, these weekly trade reports have not been published, because the employment in all localities has been very poor and there has been no need for transfers.¹⁰

Three of the railroad brotherhoods have attempted to facilitate the movement of their members by the establishment of employment bureaus. At the first convention of the Locomotive Firemen in 1888 an employment bureau was established at headquarters. It was provided that the national president should keep a register of the applicants and endeavor to secure employment for them. The officers and members of the subordinate unions were urged to inform the bureau of all vacancies and the railroad companies were requested to apply to the bureau for men.¹¹ It is understood

⁹ Interview with President James Wilson, August, 1915.

¹⁰ Interview with Secretary Drayer, August, 1915.

¹¹ Locomotive Firemen's Magazine, November, 1888, p. 809.

that the bureau was established in order to secure employment for the one thousand members who were thrown out of work through losing the Chicago, Burlington and Quincy strike in 1888. Since that time it has performed but little service in securing employment for the members of the union. President Carter says that it has been unsuccessful for the reason that a railroad generally refuses to employ engineers and firemen who have secured their experience on other roads.¹²

The Railway Conductors¹³ established its employment bureau in the same year as did the Firemen, but it was abolished after a few years on account of its failure to be of service to the unemployed. However, it was reestablished at the Detroit Convention in 1913.¹⁴ Acting President Sheppard said in 1915 that while there had been quite a number of applicants, the bureau had "been able to lend practically no assistance to the members searching for employment," although immediately following its establishment in 1913 employment was found "for several members."¹⁵ The Railroad Trainmen in 1915 appointed one of its members as chief of its employment bureau in Chicago "for the purpose of advising its members who are now in search of employment."¹⁶

Prior to 1912 a member of the Bookbinders who wished to travel in search of employment was compelled to write to the secretaries of the local unions he wished to visit before he was allowed to apply directly to the employers for work. Because of the failure of the secretaries to reply and the spirit of selfishness displayed in many localities, this rule was abolished and an employment bureau was established. It was provided that the unemployed were to register with the bureau, and local union secretaries were required to notify the general secretary of all vacancies. Members who left positions were to report this fact to the

¹² Letter to the writer, October 19, 1915.

¹³ Proceedings, 1888, p. 237.

¹⁴ Proceedings, 1913, p. 748.

¹⁵ Letter to the writer, October 16, 1915.

¹⁶ Railroad Trainmen, March, 1915, p. 40.

bureau and the employers were requested to apply for men when they were needed.¹⁷ During the first month of the bureau's existence, July, 1911, a number of members were furnished with employment,¹⁸ but the local unions did not notify the general secretary of the vacancies in their jurisdictions and the bureau was abolished.¹⁹

For several years prior to 1912 President Lynch of the Typographical Union advocated the establishment of an employment bureau under the supervision of the general secretary. The convention in 1912 instructed the executive officers to formulate plans for such a bureau,²⁰ and the following rules were adopted: (1) only members of the union were to be registered; (2) each applicant was to pay an initiation fee of \$1.00; (3) requests for men from cities in which there were local unions were to be endorsed by the local-union secretaries.²¹ The bureau was opened January 1, 1913, and several hundred dollars were expended in sending to the trade advertising pamphlets. During the first six months of its operation, 62 members registered; during the next year there were 79 applicants for employment, while for the year 1914-1915 only 29 members registered, and of these it is thought that but few received employment which could be traced to the activities of the bureau. In short, as Secretary Hays said in 1915, the "employment bureau has not proven very satisfactory."²²

In 1901 the Leather Workers on Horse Goods established an employment bureau at headquarters with three branches. The country was divided into three sections, in each of which a member was appointed as employment agent. Each was to receive applications from the unemployed and attempt to transfer them to localities in which they could secure employment. When one of the agents was unable

¹⁷ International Bookbinder, June, 1911, p. 238; *Ibid.*, August, 1911, p. 303.

¹⁸ *Ibid.*, August, 1911, p. 282.

¹⁹ Letter from Secretary W. N. Reddick to the writer, November 9, 1915.

²⁰ Proceedings, 1912, p. 302.

²¹ Typographical Journal, August, 1913, p. 86.

²² Letter to the writer, October 19, 1915.

to supply the demands in his territory, he was to notify the general secretary or one of the other agents.²³ President Balsinger in 1902 said, "The bureau has given universal satisfaction,"²⁴ but the three sub-bureaus were abolished in 1903.²⁵ Since that time the bureau at headquarters has been maintained and has kept a list of the unemployed from which the requests of employers have been supplied. Secretary Pfeiffer in 1915 said, "We have met with little or no success for the reason that it has been impossible to get the employers to coöperate with the bureau."²⁶

So far we have mentioned only the more important unions which have established employment bureaus. Although those which we have discussed are the only national unions which really perform any considerable service in placing the unemployed, there are a number of others that from time to time, under pressure from the employers, attempt to transfer the unemployed. In this category may be placed the following unions: Bakers, Blacksmiths, Bridge and Structural Iron Workers, Elevator Constructors, Stove Mounters, and Typographia. In none of these is there any permanent system of finding employment, the unions merely attempting to transfer members when some employer or local union writes for workmen.

Several unions have emphatically rejected the proposal to establish employment bureaus to which the local unions would have been required to report regularly the exact condition of trade. Thus, in 1895, the Iron, Steel and Tin Workers refused to accede to the suggestion of President Garland that an employment bureau should be established, to which the local unions should report every two weeks as to the condition of trade.²⁷ The general antipathy exhibited by the average member of a union towards any publicity of employment conditions is probably best illustrated by the history of the Bricklayers and Masons. In 1873 a

²³ *Leather Workers' Journal*, November, 1901, p. 60.

²⁴ *Ibid.*, July, 1902, p. 306.

²⁵ *Ibid.*, March, 1903, p. 32.

²⁶ Letter to the writer, October 19, 1915.

²⁷ *Proceedings*, 1895, p. 4940.

national employment bureau was established. Each local union secretary was required to inform the general secretary monthly as to the number of employed and unemployed, and whether or not any additional men were needed.²⁸ The bureau lasted but a few months, the local unions refusing to notify the secretary of the actual conditions of trade. In 1881 the union attempted to reestablish the employment bureau and at this time required only quarterly reports from the local unions.²⁹ In the following year many of the local unions refusing to report, the rules were changed so as to require only semi-annual reports.³⁰ During 1905 Secretary Dobson was requested by employers in many cities to supply them with additional men. He thereupon wrote to all local unions asking them to report the actual condition of trade, giving the number of additional men required or the number of members unemployed. Only a few responses were made and the majority of these were from cities in which employment was very poor. In commenting upon the refusal of the local unions to give publicity to trade conditions, he said: "Judging from the replies we received we understood that no matter how many men were needed to supply the demands of the employers our local unions did not take kindly to our idea or desire the fact to be known that their particular communities were in need of men."³¹ There was an attempt made at the convention in 1910 again to establish an employment bureau at headquarters, but only one third of the delegates voted in favor of the proposal.³² During 1912 Secretary Dobson once more tried to obtain from the local unions accurate information concerning the state of trade, but he was forced to abandon the idea because the local unions refused to supply him with the necessary information.³³

²⁸ Proceedings, 1873, p. 25.

²⁹ Proceedings, 1881, p. 25.

³⁰ Proceedings, 1882, p. 32.

³¹ Fortieth Annual Report of the President and Secretary, 1905, p. 334.

³² Proceedings, 1910, p. 169.

³³ Interview, August, 1915.

About ninety per cent of the American trade unions publish weekly or monthly journals which in a number of unions are set free to each member. Some of the unions, realizing the possibilities of these journals as a means of conveying information respecting employment conditions have utilized them for this purpose. For example, the Cigar Makers, Iron Molders, Plasterers, and Sheet Metal Workers publish every month in their journals the state of trade in each of their local unions. The Woodcarvers' Journal contains reports from the local unions giving the number of shops in which trade is good, fair and dull, and the number of members employed and unemployed. The Bricklayers and Masons, Carpenters, Flint Glass Workers, and Plumbers publish lists of cities in which trade is dull.

Some of the building-trades unions have for many years given considerable space in their journals to construction news in various cities. Lists of the principal contracts which have been awarded and advanced information relative to proposed buildings are published. The Bridge and Structural Iron Workers' journal contains a list of all iron and steel buildings and bridges that are contemplated, and the Bricklayers and Masons and the Lathers publish news concerning all construction work that will give employment to their members. While this information is sometimes valuable to those who wish employment, these lists have in many cases caused needless traveling. A bricklayer noticing in the journal that several large contracts have been awarded in a distant city may not know whether the construction is to be of brick, or whether the general condition of trade in the particular city is such that additional men will be required. There have been many complaints in the Bricklayers' Union concerning the publication of news of this kind, and at times the journal has discontinued publishing it. The Stone Cutters' Journal for several years contained a list of contracts awarded, but discontinued its publication in May, 1915. Secretary Drayer said that much needless traveling had been caused by the publication of

these lists since members had transferred to cities in which the journal had noted great building activity, only to find that on some of the large buildings not more than a few hundred dollars worth of stone was to be used, and in some cases that terra cotta had been substituted entirely for stone.³⁴

The Boot and Shoe Workers, Coopers, Garment Workers, Granite Cutters, and Leather Workers on Horse Goods publish the names and addresses of employers who conduct strictly union establishments, and do not prohibit their members from writing to employers for employment.

In all trade-union journals there is a great amount of correspondence from the local-union secretaries and business agents. In those unions which have a relatively small number of local unions there is opportunity for all localities to be represented, but in some of the larger building-trades unions, for example, the Carpenters, Painters, and Bricklayers and Masons, this is not feasible. These reports from the local unions generally contain information as to the state of trade, the number of members employed and unemployed and the prospects for employment. In some cases this correspondence is very valuable to the members who wish to secure employment. Among the journals which serve the purpose very well, those of the following unions may be cited: Photo-Engravers, Bookbinders, Printers, Flint Glass Workers, Granite Cutters, and Bridge and Structural Iron Workers. For the information of those members who may desire to write to the business agent or secretary of a local union as to the chances for employment in other localities, 32 of the 80 trade-union journals print lists of local-union secretaries and business agents with their addresses.

Several of the subdivisions of the national unions, such as state conferences and districts councils, have attempted to devise means by which information concerning the state of trade could be conveyed to the unemployed. Among the building-trades unions, conferences are formed in the vari-

³⁴ Stone Cutters' Journal, May, 1915, p. 1.

ous States, composed of the local unions. The Bricklayers and Masons have 25 such conferences, while the Painters have 17 and the Carpenters 10. The Texas State Council of Carpenters sends to each of its members a monthly report of the number employed and unemployed, the prospects for employment, and the number of men wanted in each local union.³⁵ The Massachusetts State Conference of Bricklayers and Masons also publishes monthly reports of the condition of trade in each local union.³⁶

Some of the districts of the unions have gone further than simply publishing the condition of trade, and have established employment bureaus. Thus, the New England Typographical Union and the Indiana Typographical Conference have conducted employment bureaus for several years, and President Lynch of the Printers says they have produced results "to the satisfaction of affiliated unions and their members."³⁷ The district vice-presidents of the Lithographers receive applications for employment and requests from the employers for workmen. Vice-President Lawrence reported that in 1906 he had succeeded in supplying the employers in his district with workmen from the five hundred applications which he had received during the year from unemployed members.³⁸ Frequently several local unions of a trade will conduct an employment bureau in common. Thus in 1915 the railroad divisions of the Sheet Metal Workers established an employment bureau in St. Louis, Missouri.³⁹ This practise exists to a certain extent among the pattern makers and in some other unions. It may be said that while these subdivisions of the unions do not generally coöperate very readily with one another in employment matters, they serve in some degree by their connections to direct the unemployed to localities in which work can be secured.

³⁵ *The Carpenter*, September, 1906, p. 40.

³⁶ *Bricklayer and Mason*, May, 1908, p. 70.

³⁷ *Proceedings*, 1912, p. 21.

³⁸ *Proceedings*, 1906, p. 193.

³⁹ *Sheet Metal Workers' Journal*, October, 1915, p. 399.

In those unions which do not maintain employment bureaus at the national headquarters, additional workmen are generally secured by one local union's writing or telegraphing to other local unions. This method is largely employed by the building-trades unions. When New York City is in need of additional building-trades mechanics, either Philadelphia, Baltimore, Boston, Albany, or Pittsburg is notified of the shortage of men. Sometimes, as is the case with the Elevator Constructors and Bridge and Structural Iron Workers, the business agent telegraphs to the local union of a nearby city to send a certain number of men, with the understanding that these men will be guaranteed employment if they come. The following letter, which was printed in the Bridge and Structural Iron Workers' Journal, was written by the business agent of Salt Lake City, and illustrates the methods in force. "I received a telegram from business agent Hendricks of Los Angeles asking me if I could furnish eight men for the San Pedro at Calientes, Nevada. I replied that I could send as many men as was needed. I received another telegram to send eleven men, so I sent them out on the 24th on the bases of \$4.50 for nine hours and transportation expenses."⁴⁰

But the greater part of the movement of trade unionists in search of employment does not result either from the activities of the union employment bureaus or through the notification of one local union by another that men are needed. The ordinary member realizes that local unions do not generally send for additional men until the pressure from employers forces them to do so. He knows that there are numerous instances in which other local unions are not notified of opportunities for employment even after the employers register their wants. Therefore, workmen keep in communication with one another and when the prospects are good, those who are cognizant of the fact notify their friends. Many workmen also write to the various business agents and local union secretaries to inquire about the pros-

⁴⁰ The Bridgemen's Magazine, July, 1911, p. 448.

pects for employment. This is the manner in which the unemployed, who are not habitual "travelers," generally secure their information. At times the local union secretaries complain that they are compelled to answer too many letters. The Washington business agent of the Bridge and Structural Iron Workers reported in 1904 that he received an average of four letters each day from members asking for information concerning the prospects for employment.⁴¹ Other workmen write to their friends in other cities inquiring as to the conditions of trade.

We have outlined, so far as ascertainable, the methods of those unions which have attempted to devise means for giving information to the unemployed which will enable them to find employment in other places. There are in the United States over 125 national unions. Of these, we have found that only 14 maintain employment bureaus. And of these 14 bureaus, only seven can be said to possess merit. The value of the others to the unemployed is negligible. Numerous reasons have been advanced by trade unionists for the lack of success of the employment bureaus which have been established, and for the fact that the other unions do not even attempt to provide means for the dissemination of a knowledge of trade conditions. The failure of American unions to solve the problem of transferring their members from localities in which trade is poor to those in which work can be secured is chiefly attributable to the selfishness of the local unions. There are very few trades in which traveling members do not receive a cool welcome from the local unions in which they deposit their cards. The members of a local union look upon the work to be done in their community as belonging to them, and they resent any intrusion upon the part of non-residents. Although this attitude is contrary to the doctrines of unionism, the greater number of union officials concede its existence. It is this spirit which has made it impossible to induce the local unions of the Bricklayers and Masons, the Cigar Makers and vari-

⁴¹ Ibid., August, 1904, p. 28.

ous other unions, to report to other localities when men were needed.

Even when additional men are in great demand the local union will not attempt to obtain members from other localities. The secretary of the Bricklayers and Masons in 1901 said: "The local unions would rather allow non-union men to be employed at periods of prosperity than secure outside union men, for fear that the latter would stay in town after the busy season was over, and thus there would be less work per capita for the members."⁴² Many devices besides the use of non-union workmen are practised in order to minimize the demand for workmen from other cities. Overtime is frequently worked and it has been said that the men will perform work which would ordinarily require the services of more men. The editor of the *Bookbinders' Journal*, in remarking upon the selfishness of the local unions, said: "I am confident that the spirit of home-guardism has been and still is detrimental to our interests, and best shows a clannish spirit which often keeps an extra man out of a shop while a crew of five men will go on and do the work of a crew formerly consisting of six men."⁴³

The local unions have not been content with denying to non-residents the knowledge of trade conditions, but have also enforced rules which are designed to make it more difficult for the traveling members to gain admission to the local union. Many of the local unions of the Bricklayers demand the sum of \$5.00 before traveling cards are accepted.⁴⁴

Some local unions have gone even further, according to the secretary of the Electrical Workers, who says that in 1915 complaints were received that the local unions in some localities had refused to accept traveling cards on any condition.⁴⁵ Secretary Skemp of the Painters reported to the convention of 1915 that there was a "growing disposition to

⁴² The Bricklayer and Mason, September, 1901, p. 1.

⁴³ International Bookbinder, June, 1911, p. 238.

⁴⁴ The Thirty-fifth Annual Report of the President and Secretary, 1900, p. 128.

⁴⁵ Electrical Worker, August, 1914, p. 370.

deny traveling members the right to deposit clearance cards," and that "all kinds of schemes are devised and excuses invented to keep the stranger without the gate and reserve the work for the resident member."⁴⁶

Even after the traveling member has gained admission, he is not infrequently discriminated against. The local unions, in many cases, manage so that resident members shall be given preference over traveling members when employment is offered. It is a well known fact that in the building-trades unions of New York, Chicago and several other cities the non-resident member has small chance of securing work until the business agent has placed the resident members. A national rule of the Cutters in the Flint Glass Workers gives preference to local workmen,⁴⁷ and there have been cases in the Marble Workers⁴⁸ and in other unions where traveling members who had deposited their cards and had received employment were forced by the business agent to transfer to another city in order to "make room for resident members who were unemployed."

The exclusiveness of the local union is not always due to the desire to retain all work for the resident members. Frequently a local union desires to make demands upon the employers for an increase of wages or for better working conditions, and a time when the locality is in need of additional men offers a favorable occasion for the local union to enforce its demands. At such a time the local union does not want the information that employment conditions are good to reach other localities, and consequently it will try to keep the traveler from the city.

If the trade unionist has secured, through the aid of the agencies described above, or otherwise, information as to where he will be able to secure employment, there remains the problem of getting to the place where employment may

⁴⁶ Report of General Officers to the Eleventh Convention, 1913, p. 71.

⁴⁷ Rules of the Cutters, No. 22, in Proceedings of the Flint Glass Workers, 1911, p. 143.

⁴⁸ Proceedings, 1913, p. 163.

be had. The knowledge that a position can be secured in another city is of no value to a workman unless he is able to make the transfer. Inasmuch as the distances to be traversed in some cases require the expenditure of a considerable sum of money, the workman sometimes finds himself unable to go.

In some trades the employers advance traveling expenses, but this is not usual. Only in periods of great prosperity are such instances general. Thus in 1901, during a scarcity of granite cutters in the East, a firm in Hall Quarry, Maine, furnished transportation expenses to twenty men from Raymond, California.⁴⁹ But in a normal season employers of granite cutters do not advance expenses to their workmen. In some unions, such as the Elevator Constructors and Bridge and Structural Iron Workers whose members are taken by the employers from one city to another, the expenses are paid by the employers. As a general rule, however, the workmen are forced to rely upon their union or their own resources for traveling expenses even when they are engaged by an employer in another locality.

Only in a small percentage of cases are workmen assured of employment before the actual transfer is made. They may have been led to expect work at such and such a place, but it is usually only after their arrival that they obtain employment. In these cases the workman can not look to the employer for transportation expenses. If he is unable to pay the expense, his recourse must in most cases be to his union.⁵⁰ Many of the unions have considered it their duty to furnish members who desire to travel with the necessary transportation expenses, either as a loan or a gift.

The following table shows the amounts which have been expended for this benefit since 1903 by those unions which report to the American Federation of Labor.

⁴⁹ Granite Cutters' Journal, August, 1901, p. 5.

⁵⁰ Some of the railroad systems have agreed to give transportation to members of the Brotherhoods who are unemployed and are traveling in search of work, provided they have been engaged by a common carrier within the previous ninety days. This is done under a provision made by the Interstate Commerce Commission (Locomotive Engineers' Journal, January, 1915, p. 44).

AMOUNTS PAID AS TRAVELING LOANS AND BENEFITS

Year	Amount	Year	Amount
1903	\$84,891.58	1910	\$42,999.55
1904	73,441.90	1911	58,784.71
1905	62,989.71	1912	40,571.02
1906	57,340.93	1913	33,693.10
1907	53,598.86	1914	54,404.90
1908	51,093.86	1915	70,346.70
1909	51,967.87	Total	\$746,122.69

The systems of traveling loans and benefits in American trade unions have been, generally speaking, failures. At one time or another the following unions have paid traveling loans or benefits: Cigar Makers, Flint Glass Workers, Granite Cutters, Leather Workers on Horse Goods, Lithographers, Machinists, Typographia, and White Rats Actors. Only the Cigar Makers and Lithographers have maintained their systems to the present.

During the earliest years of the Cigar Makers' Union members who desired to travel in search of employment were granted loans by the local unions. As no great efforts were made by the local unions to which the members transferred to collect these loans, the system of loans from local unions was superseded in 1867 by a system established and maintained by the national union.⁵¹ Under this plan an unemployed member was entitled to a loan sufficient to take him to the nearest union. The loan was to be repaid to the local union in which the member secured employment in weekly installments to the amount of twenty per cent of the member's earnings.⁵² The carelessness of the secretaries in collecting these loans made the system an absolute failure and it was abolished in 1878.⁵³

The local union of Warren, Pennsylvania, then proposed that the National Union maintain a "traveling fund" for the purpose of aiding traveling members. This aid was to be a gift and not a loan, but the measure failed of adoption.

⁵¹ Proceedings, 1867, p. 155.

⁵² Constitution, 1867, art. 11.

⁵³ Cigar Makers' Journal, October 5, 1878, p. 3.

However, in the following year Secretary Samuel Gompers of the New York local union proposed a new plan which was adopted by referendum vote.⁵⁴ It provided that any member in good standing for six months who was unemployed and desired to travel was entitled to a loan sufficient for transportation expenses by the cheapest route to the nearest local union, and so on to the next union, until the loans reached the sum of \$20.00.⁵⁵ The amount of any one loan was limited to \$12.00 in 1884,⁵⁶ and in 1896 it was further reduced to \$8.00.⁵⁷ The system in operation at present provides that members who desire to obtain traveling loans must have been in good standing for one year. After obtaining employment the borrower must pay to the collector of the shop in which he is employed ten per cent of his weekly earnings until the loan is repaid.⁵⁸

The Granite Cutters established a traveling loan system in 1880, three years after the organization of the national union. It provided that any member in good standing for at least six months who was not able to obtain employment and wished to transfer to another local union was entitled to a loan of not more than \$10.00. It was necessary for the borrower to secure two members in good standing to become security for him, and the loan was to be repaid in installments of ten per cent of the weekly earnings.⁵⁹ In 1888 the latter provision was changed so that the member was required to pay the loan in installments of twenty-five per cent of his weekly earnings.⁶⁰ From the outset the system was a failure on account of the difficulty in securing payment of loans. It was thought that the provision that those acting as security for the loans should be held responsible would prove a safeguard. But in 1891 the secretary said that the majority of the members "regarded

⁵⁴ *Ibid.*, August, 1879, p. 2.

⁵⁵ Constitution, 1880, art. 4.

⁵⁶ Constitution, 1884, art. 7.

⁵⁷ Constitution, 1896, art. 27.

⁵⁸ Constitution, 1912, secs. 104-116.

⁵⁹ Constitution, 1880, art. 43.

⁶⁰ Constitution, 1888, art. 33.

vouching as an empty formality" as was shown by the number of loans then unpaid.⁶¹ President Duncan states that the abuses finally became so flagrant that the entire system was abolished in 1897. There were instances in which three members would unite for the purpose of securing loans. Each would secure a loan with the other two as security, and in many cases none of the money was repaid.⁶² In March, 1902, five years after the abolition of the system, the secretary published a list of loans amounting to several thousand dollars which were still unpaid.⁶³

The history of the traveling loan in the Flint Glass Workers is much the same. During the earliest years of the union the unemployed who desired to travel in search of employment were furnished transportation by the national union. The applicant was required before a loan was granted to submit satisfactory evidence that he had secured a position. The system proved a complete failure. Secretary Kunzler reported to the convention of 1896 that some members had procured loans by means of false telegrams and letters which purported to show that there were jobs at some place ready for them. He also said that of the \$10,000 which had been loaned from 1885 to 1896 only eighteen per cent had been repaid.⁶⁴

At various conventions the union adopted rules which it was thought would safeguard the union against unauthorized loans, but the traveling members always succeeded in evading them. During the years preceding 1902 the system was still further abused and the loans became in reality gifts. Secretary Dobbins reported to the convention of 1902 that of the \$3,376.04 loaned during the previous year only \$975.53 had been repaid, and a large part of the sum received was deducted from strike benefits and bills sent to the office for personal services. He said that members still persisted in sending to the union letters and telegrams

⁶¹ Granite Cutters' Journal, April, 1891, p. 4.

⁶² Letter to the writer, October 20, 1915.

⁶³ Granite Cutters' Journal, March, 1902, p. 14.

⁶⁴ Proceedings, 1896, p. 87.

written by one member to another telling him to come on immediately as there was a job awaiting him, but in the majority of cases the member never transferred to another city.⁶⁵ At this convention the membership became so aroused over the granting of illegal loans that there was a movement to abolish the whole system, but it did not succeed.⁶⁶

At the convention in 1904 several new provisions were adopted. The national secretary was to loan no money to members except for transportation expenses and then only when the applicant had a letter or telegram from an employer or local union to prove that the member was guaranteed a job. The member securing the loan was required to sign a promissory note for the amount borrowed and was to pay ten per cent of his earnings until the loan was repaid. The national secretary was to notify the trade by circular of the loans granted and the local unions were held responsible for the debts of their members.⁶⁷ As a result of these rules a greater percentage of the loans were repaid, and there was a great increase in the amounts loaned. The union was still unable to force many local unions to collect the loans and in several instances local unions were not permitted to send delegates to the convention because they were not prompt in the collection of loans. Frequently, delegates to the conventions were found to be the worst offenders. In April, 1907, the national secretary issued a pamphlet containing the names of 1304 members who had borrowed an aggregate sum of \$24,000, an average of more than \$18. Several months later, the secretary reported that he had succeeded in finding only 109 of the debtors. When this was reported to the convention there was little opposition to the abolition of the entire system of traveling loans.⁶⁸

During the next few years the traveling members waged a campaign for the reestablishment of the loan system and

⁶⁵ Proceedings, 1902, pp. 127, 128.

⁶⁶ Ibid., p. 203.

⁶⁷ Proceedings, 1904, pp. 229, 230.

⁶⁸ Proceedings, 1907, pp. 93, 174.

this, coupled with the scarcity of men in some places, led to a reconsideration at the convention in 1910. It was said that the abolition of the system had "worked a hardship upon our members in not being able to secure transportation from one locality to another and that it has caused many complaints from manufacturers on account of many places standing idle in their factories." The convention reestablished the system with entirely new rules.⁶⁹ It was provided that a member should have been unemployed for two weeks and must be free of any indebtedness to the union before he was entitled to a loan. He was required also to show a letter from the employer or local union to prove that he was guaranteed a position. After securing employment ten per cent of his earnings were to be paid until the loan was repaid. A local union which accepted the card of a member who had borrowed transportation expenses and failed to collect ten per cent of his earnings was held responsible for the debt.⁷⁰

During the first year of operation only thirty-five per cent of the loans were repaid and the abuses which characterized the old system soon reappeared.⁷¹ The national officers were powerless to prevent the granting of illegal loans and were unable to force the local-union secretaries to collect the loans when made. The abuses became so flagrant that the system was again abolished at the convention in 1913,⁷² and no loans have been granted since January 1, 1914. However, at the convention in 1915 there was a movement for its reestablishment, but owing to the strong opposition of the officers the motion failed of adoption.⁷³

The White Rats Actors established in 1912 a system of traveling loans which was not unlike that of the Flint Glass Workers. Only those members who could show an "enforceable contract with a responsible manager for an engagement" were entitled to a loan. The borrower gave a

⁶⁹ Proceedings, 1910, p. 143.

⁷⁰ Ibid., p. 153.

⁷¹ Proceedings, 1912, p. 216.

⁷² Proceedings, 1913, p. 292.

⁷³ Proceedings, 1915, p. 315.

promissory note for the amount loaned and agreed to repay the same out of the first week's salary. If he failed to repay the loan, the union attached his wages.⁷⁴ With such precautionary measures it was thought that very few losses would result. During 1912 there was loaned \$32,000, of which \$14,155 was outstanding in April, 1913.⁷⁵ During the next two years about \$60,000 was loaned and the amount which was not repaid of the loans granted during the three years of the operation of the system was \$14,000. Thus the union lost fifteen per cent of the amount loaned. The members decided that the system was costing too much in proportion to the benefits received and abolished it in August, 1915.⁷⁶

The Leather Workers on Horse Goods established a traveling loan system when the union was organized in 1896. It was provided that an unemployed member could obtain from a local union a loan sufficient to transport him to the nearest branch in the direction he wished to travel. The first loan was not to exceed \$12.50 while the total amount which could be borrowed in any year was \$21.00. The loan was to be repaid in installments of fifteen per cent of the member's weekly earnings.⁷⁷ Flagrant abuses soon crept in and the president frequently notified the local union secretaries that many illegal loans were being granted and only a small percentage of loans were being repaid. But no improvement resulted from the publicity given to the abuses, and the system was abolished in October, 1904.⁷⁸

The Machinists, soon after the union was organized, also established a traveling loan system. The loans were granted by the local unions and it appears that they suffered all losses. It had been expected that the local unions would be careful in granting loans and in seeing that they were repaid. In 1895 the president reported that during the two

⁷⁴ Constitution, 1912, art. 14, sec. 1.

⁷⁵ Letter from Secretary W. W. Waters to the writer, April 22, 1913.

⁷⁶ Letter from Secretary to the writer, November 8, 1915.

⁷⁷ Constitution, 1896, art. 4, sec. 1.

⁷⁸ Leather Workers' Journal, January, 1905, p. 252.

previous years \$5,000 had been loaned, and the system had "been unmercifully abused."⁷⁹ During the next two years \$6,124 was loaned to traveling members. Only a small amount was ever repaid. This was due, the president said, to the fact that there was no provision as to the limit of time for the payment of the loans.⁸⁰ At the convention in 1897 it was provided that the loans must be repaid within ten weeks after they were granted.⁸¹ The unemployed member was not granted a loan unless his dues had been paid to date, and the amount that could be borrowed at any one time was not to exceed \$5.00, nor could any further loan be secured until the previous one had been repaid. The financial secretary of the local union to which the member traveled was required to collect the sum borrowed and forward it to the local union which granted it. The system failed completely. In 1903 President O'Connell said that only a small percentage of the loans were repaid, that the system had tended to encourage dishonesty, and that it had caused an unlimited number of disputes among the local unions. For these reasons he recommended that it be abolished.⁸² The convention in 1903 decided that no further loans would be granted after July 31 of that year.⁸³

The system of traveling loans of the Lithographers is similar to that of the Machinists in that the loans are made by the local unions and all losses are met by the local unions. The national constitution provides that any member who desires to travel in search of employment, and is in need of financial assistance shall make application to the local union for a loan. The local executive board investigates the application and grants the loan if the member appears worthy. The amount of the loan is entered in the member's dues-book and it is the duty of the secretary of the local union to which the member transfers, to collect the loan and

⁷⁹ Proceedings, 1895, p. 12.

⁸⁰ Proceedings, 1897, p. 8.

⁸¹ Constitution, 1897, art. 10, sec. 3.

⁸² Proceedings, 1903, p. 402.

⁸³ Ibid., p. 531.

return it to the local union which granted it.⁸⁴ No statistics are available as to the amounts which have been loaned and collected during the existence of the system, but it is said that the members make considerable use of it.

The Deutsch-Amerikanischen Typographia established its traveling benefit in connection with an out-of-work benefit in 1884.⁸⁵ This system differed from others in that the traveling member was given the transportation expenses as a gift and not as a loan. An unemployed member in good standing for six months was entitled to two cents per mile for the first two hundred miles and one cent for each additional mile he wished to travel, provided that the total sum did not exceed \$10. After spending three months in the local union to which he traveled he was entitled to transportation expenses to another local union, but he could not draw more than \$25 in one year. If a member became unemployed through his own fault, he was not entitled to the benefit for three months, and if the position had been given up voluntarily, he could not receive the benefit unless the executive council of the local union approved his action. Those who drew the traveling benefit were supposed to transfer at once to another city or return the amount received. Although the benefit was free, it appears never to have been greatly utilized. For example, in 1907 there were only fifteen members who applied for benefits totaling \$104.60. The system was abolished in 1908. Secretary Miller explains that this was on account of the flagrant abuses of the benefit by the members. He says that members living in Chicago and the Middle West when going on a vacation trip to the East or to Europe would draw the maximum benefit. In short, he says, the benefit was used as a means of partly defraying the expenses of members on "holiday trips."⁸⁶

At the Painters' convention in 1910 there was a move-

⁸⁴ Constitution, 1913, art. 20, sec. 1.

⁸⁵ Letter from Secretary Hugo Miller to the writer, October 19, 1915.

⁸⁶ Ibid.

ment to provide traveling members with a loan of not more than \$10, but the proposed plan received little attention.⁸⁷ The Bricklayers and Masons in 1873⁸⁸ and the Plumbers in 1908⁸⁹ also considered the advisability of establishing a traveling loan system, but both proposals failed of adoption. At the Typographical convention in 1889 there was proposed a traveling loan of two cents per mile, but it was defeated.⁹⁰

In those unions which have not established a national traveling loan system, some of the local unions maintain funds from which the members who desire to travel may secure a loan, or from which the "traveler" may secure a gift of a few dollars to aid him in transferring to another city. If a member is assured of a job or has fair prospects of securing employment in another city, there is scarcely a local union in any trade which will not advance him the necessary traveling expenses. But if the member applying for a loan is a "traveler," or has little prospect of securing employment in another city, the local unions do not always grant the loan. Generally the amounts of the loans are entered in the members' dues-books and the local unions in which the card is deposited are supposed to collect the loans and return them to the local unions which granted them.

The systems of traveling loans and benefits have failed largely because they have induced needless traveling through the administrative inefficiency of the local-union secretaries. During the first year's operation of the Cigar Makers' system, the condition of trade was bad all over the country. The members were told that there were no jobs to be had in any city,⁹¹ but since the traveler could secure a loan from the union many went in search of work. A traveling loan system is socially injurious when a workman can secure a loan despite the fact that there is no work for him to do in the locality to which he transfers. The union works a hardship upon its members when it grants loans without first

⁸⁷ Proceedings, 1910, p. 44.

⁸⁸ Proceedings, 1873, p. 27.

⁸⁹ Proceedings, 1908, p. 91.

⁹⁰ Proceedings, 1889, p. 124.

⁹¹ Cigar Makers' Journal, July 10, 1881, p. 1.

directing members to places where employment may be had. For many years the English trade unions granted traveling benefits in the same manner as do the American unions, that is, without ascertaining whether the member was going to improve his condition by transferring. Within recent years, however, the English system has undergone a considerable change, and traveling loans and benefits are now granted chiefly to those for whom employment has been found in another city. Since traveling loans are now granted in the United States chiefly by the local unions, which usually demand that the applicant shall be assured of employment before the loan is granted, it is probably true that the traveling loan is now somewhat more useful than before.

Another cause of the failure of the traveling loan systems was the granting of unauthorized loans. Although the unions had generally provided apparently stringent rules for the administration of the system, many unauthorized loans were granted. Among the Cigar Makers this abuse appeared at an early date. In 1881 the secretary remarked that he knew of many members who had drawn loans and never left their homes, and of others who claimed money for a distance of two hundred miles and did not go farther than fifty miles.⁹² The local union secretaries became so careless in the matter of granting loans that the union made a rule that secretaries who granted unauthorized loans were to be fined \$5. In June, 1884, twenty-one secretaries were fined.⁹³ The loan systems of the German Printers, Granite Cutters, Flint Glass Workers, Leather Workers on Horse Goods, Machinists, and White Rats Actors were abolished primarily on account of the abuses in granting loans. It seems that the local-union secretaries granted loans in practically all cases, simply trusting that, as the loan was entered in the members' dues-books, the local unions to which they traveled would collect the money.

Through the carelessness of the secretaries in the administration of the systems the amounts of loans which were

⁹² *Ibid.*, p. 1.

⁹³ *Ibid.*, July, 1884, p. 3.

not repaid were very large in some cases. During the thirty-five years existence of the Cigar Makers' system, there has been expended \$1,337,271, or an average of \$38,207 each year. The amount loaned per capita has varied from 63 cents in 1880 to \$3.48 in 1884, and has averaged during the period \$1.50. On the first of January, 1915, there were outstanding loans to the amount of \$109,220.31. President Perkins states that of this sum about one-half is collectible.⁹⁴ Thus the cost of the system for thirty-five years has been about \$55,000, an average annual per capita of 8 cents. The Flint Glass Workers have not expended nearly so much on their system as the Cigar Makers. During the ten years in which loans were granted, the sum of \$37,821 was expended, an average of \$3,782. The amount loaned per capita varied from 10 cents in 1914 to 73 cents in 1907, and the average annual per capita expenditure was 50 cents. When the system was abandoned the sum of \$15,589 was outstanding. Since only a small percentage of this was collectible, the annual average net cost per capita was \$1.50, or twenty times the cost to the Cigar Makers. The Leather Workers on Horse Goods loaned during the seven years in which the system was in operation the sum of \$17,063. The annual per capita expenditure was 57 cents, and the loans outstanding when the system was abolished amounted to \$2,526. Thus the annual average per capita cost was less than 9 cents, or about the same as that of the Cigar Makers. In the Typographia, despite the fact that the benefit was a gift, the cost was very small. During the twenty-four years' operation of the benefit the sum of \$8,376 was expended. The average annual per capita cost varied from 10 cents in 1907 to 61 cents in 1885 and only averaged 31 cents for the entire period.

The following tables give the cost and other financial details of the systems in the Cigar Makers, Typographia, Flint Glass Workers, and Leather Workers on Horse Goods.

⁹⁴ Letter to the writer, October 19, 1915.

COST OF THE MAINTENANCE OF THE TRAVELING LOAN BENEFIT

Year	Cigar Makers			Typographers		Flint Glass Workers		Leather Workers on Horse Goods	
	Amount Loaned	Per Capita	Unpaid	Amount Paid	Per Capita	Amount Loaned	Per Capita	Amount Loaned	Per Capita
1880	\$ 2,808.15	\$.63	\$ 1,182.80						
1881	12,747.09	.87	8,080.13						
1882	20,386.04	1.78	9,951.61						
1883	37,135.20	2.81	21,030.35						
1884	39,632.08	3.48	30,665.70						
1885	26,683.54	2.22	35,122.50	\$345.50	\$.61				
1886	31,835.71	1.29	36,806.59	264.10	.27				
1887	49,281.04	2.34	47,813.70	483.45	.44				
1888	42,894.75	2.50	54,046.96	669.29	.59				
1889	43,540.44	2.71	56,489.72	456.17	.40				
1890	37,914.72	1.53	52,499.64	576.65	.46				
1891	53,535.73	2.21	60,764.74	622.47	.47				
1892	47,732.47	1.78	58,924.46	797.19	.57				
1893	60,475.11	2.25	78,143.98	439.64	.31				
1894	42,154.17	1.52	82,975.37	680.96	.56				
1895	41,657.16	1.50	87,904.55	304.46	.27				
1896	33,076.22	1.39	91,301.49	339.86	.30				
1897	29,067.04	1.10	88,601.20	279.50	.25				
1898	25,237.43	.95	83,080.53	390.62	.35			\$ 102.00	\$.10
1899	24,234.33	.83	75,542.11	320.74	.29			249.00	.11
1900	33,238.13	.97	75,014.50	178.79	.17			639.25	.20
1901	44,652.73	1.31	80,155.94	175.05	.17			2504.85	.60
1902	45,314.05	1.22	78,325.95	107.28	.11		\$.50	3,526.65	.73
1903	52,521.41	1.33	82,114.55	159.56	.16		.63	7,415.25	1.61
1904	58,728.71	1.41	88,382.44	181.85	.18		.76	2,626.50	.64
1905	55,293.93	1.37	93,040.65	195.46	.20		.66		
								\$ 62.00	\$.62
								136.50	.11
								244.30	.20
								1,137.20	.60
								1,894.75	.73
								4,112.85	1.61
								2,526.80	.64

Year	Cigar Makers			Typographers		Flint Glass Workers		Leather Workers on Horse Goods		
	Amount Loaned	Per Capita	Unpaid	Amount Paid	Per Capita	Amount Loaned	Per Capita	Amount Loaned	Per Capita	Loans Outstanding
1906	50,650.21	1.29	94,611.07	147.52	.15	3,953.82	.57			
1907	50,063.86	1.21	99,332.43	104.60	.10	5,099.71	.73			
1908	46,613.44	1.15	109,142.35	155.30	.16					
1909	41,589.34	.94	112,111.31							
1910	39,828.77	.91	112,479.30							
1911	38,543.47	.90	117,435.17			4,542.87	.50			
1912	33,113.10	.82	117,162.65			2,086.17	.24			
1913	45,264.82	1.12	102,487.62			2,803.18	.25			
1914	51,077.15	1.27	109,220.31			1,051.65	.10			
Total....	\$1,337,271.93			\$8,376.01		\$37,821.83		\$17,063.50		
Average .	\$38,207.77	\$1.50			\$3.31		\$50	\$2,437.64	\$57	

In conclusion, there are certain definite hindrances to the movement of union workmen from one city to another which very largely nullify in some unions the attempts to promote a better distribution of labor. As has already been noted, many unions have delegated to their local unions the power to fix the amount of the initiation fee. They have also provided that a member transferring to a local union in which the initiation fee is greater than in the city from which the member transferred must pay the difference before his card is accepted. Members of the Carpenters⁸⁶ and Painters⁸⁶ of less than one year's standing are obliged to pay such differences when they travel from one city to another. Since some local unions have established high initiation fees in order to discourage members from traveling, the amount to be paid before a working card can be obtained is sometimes sufficient to deter members from transferring.

Another condition which operates to hinder transference in those unions which have only local systems of death and sick benefits, is that a member transferring from one local union to another forfeits all claims to benefits in the union from which he goes unless he pays the dues and assessments to that association, and does not become a beneficiary in the local union to which he transfers until he has been a member for a certain period, generally one year.

The rules governing seniority rights and privileges, which were discussed in a previous chapter, have a marked effect upon the transference of workmen. Indeed, in some unions this system has made traveling a negligible factor. Thus, President Carter of the Locomotive Firemen and Engineers says that members of this union rarely transfer from one place to another or from one company to another unless they are among the last on the list.⁸⁷ A member who has been employed by a railroad for several years has usually secured favorable seniority rights and when laid off by the

⁸⁶ Constitution, 1913, sec. 106.

⁸⁶ Constitution, 1913, sec. 50.

⁸⁷ Letter to the writer, October 19, 1915.

company on account of depressed business conditions, hesitates to apply for employment in another division of the road or to another company because his seniority rights would not be recognized and he would be compelled to start at the bottom of the list, thus losing all he had gained during his former employment. Professor Barnett has pointed out how the priority rights of the Printers have operated to decrease mobility of labor because of the fact that the most efficient printer can not transfer his priority rights from one city to another or from one shop to another.⁹⁸

The "permit" system, discussed in a previous chapter, was shown to have been conceived with the idea of controlling the number of members of the unions. Although this is the primary reason for its existence, the local unions have succeeded in utilizing it to prevent the movement of members from other local unions. These local unions when in need of men will not attempt to procure experienced workmen from other localities, but will issue permits to inexperienced "handy men." The local unions appreciate the fact that after employment slackens they can revoke the permits of the helpers, but where they have secured union members from other cities they probably could not get rid of them when employment became scarce. This phase of the permit system has come into prominence during the past few years. The Elevator Constructors at their convention in 1904 provided that the local unions should apply to other cities for workmen before issuing permits,⁹⁹ but it appears that this rule is violated. President Murphy recently stated that the local unions favored the permit system principally because they could provide the employers with sufficient men without procuring members from other cities.¹⁰⁰ The secretary of the Brewery Workers has said that the local unions, "due to their selfishness," used permit workmen in time of prosperity rather than apply for men from the nearby cities.¹⁰¹

⁹⁸ Barnett, *The Printers*, p. 241.

⁹⁹ *Proceedings*, 1904, p. 7.

¹⁰⁰ Interview, August, 1915.

¹⁰¹ *Proceedings*, 1910, p. 160.

CHAPTER V

DISTRIBUTION OF EMPLOYMENT

Unemployment due to contraction of demand may be either concentrated upon a part of the working force, or be distributed more or less equally among the entire working force. In both cases the aggregate wages will be the same, and the total amount of unemployment will not have been decreased. The difference to the individual workman, however, is very great. It is obvious that if an employer expends two dollars for labor, it would be socially more advantageous to divide the employment between two otherwise unemployed workmen than to concentrate it upon one of them; there would be less suffering if each of the two had one dollar than if one man possessed the two dollars.

It must be realized, however, that there are conditions in particular industries which tend to make the adoption of such a policy socially injurious. Thus, the longshoremen are confronted with the problem of having the work distributed among too great a number of workmen. The policy has also been disadvantageously used by the unions in certain trades in which machinery has displaced a great number of workmen, when they have attempted to so distribute employment as to maintain the original working forces.¹ In such cases the problem is different and the policy of equal distribution of employment is open to criticism. But where the contraction of demand is due to temporary fluctuations, equal distribution of employment meets with but few valid objections.

The distribution of employment is accomplished chiefly in the following ways: (1) Reduction of the working hours per day or week of the entire force of workmen. (2) Di-

¹ *Typographical Journal*, March, 1915, p. 456.

vision of the working force into groups, each working the normal day or week in rotation. (3) Reduction of the working hours to a certain point, after which the smaller amount of employment is met by a dismissal of workmen. In some trades one of these methods exists, while in others two or three of them are found side by side. It will be the aim in this chapter to inquire as to the extent to which these various methods are utilized in the more highly organized trades and the influence of the union in bringing about their adoption.

The first method—the working of short time—exists as a general custom in the following unions: United Mine Workers, Western Federation of Miners, Ladies Garment Workers, United Garment Workers, Tailors, Cloth Hat and Cap Makers, Textile Workers, Glove Makers, Hatters, Potters, Flint Glass Workers, and Iron, Steel and Tin Workers. It is not to be inferred that short time is not used in other unions, because, as will be pointed out later, this method exists, to a certain extent, in almost every trade. But it is only in the unions named that the practice is in force throughout the jurisdiction of the unions.

The United Mine Workers and the Western Federation of Miners have probably a more effective system of sharing work than that practised in any other union. When the operator has secured a force of miners sufficient to properly work his mine in the busy season, he is rarely allowed to reduce this number on account of a slackened demand for coal. He is obliged to give to every workman an equal number of hours' work in the mine. As the dull season approaches, he reduces the number of days to be worked each week. When the demand for coal is not sufficient to justify the working of a full day, then only a certain number of hours are worked. In any event, each workman must be given the same number of hours of employment. In consequence of these demands of the union and of the seasonal character of the industry, the mines are idle during many days of the year. In the period 1900-1910 the

number of idle days in the anthracite fields varied from 71 in 1910 to 184 in 1902, and in the bituminous fields from 66 in 1907 to 107 in 1908.² Although this system was generally in force before the miners became strongly organized, and is at present the rule in a number of non-union mines, the foremen under non-union conditions were always at liberty to discharge a man when a reduction of the working force was desired. The union now passes judgment upon discharges, and the employer must prove that other reasons than the desire to reduce the working force are the cause of the discharge.

Not only does the union demand an equal distribution of working time, but "every mine worker shall be given work in his turn when applying for same."³ Obviously, the foreman might allow every man to descend into the mine, but could place them in such a position that some would secure only a few cars each day. There have been instances where a miner stayed in the mine all day and never got a pit car to load. The rule was devised not to equalize the miners' earnings or to limit the output but to give every man an equal opportunity to work. In mines where both machine and pick miners are used the union has obtained a rule that whenever the machines are operated and the pick miners not employed, "such turn shall be given that will, as nearly as possible, equalize the earning capacity of the machine loaders and the pick miners."⁴

Where an operator closes down one of his mines and works full time in another, the union has not attempted to enforce any arrangement by which those unemployed through the closing of one mine may share in the working of the other; but there has grown up in many mining communities a custom under which the work is divided. John Mitchell says of this custom: "This system of dividing

² United States Geological Survey: Mineral Resources of the United States, vol. 2, 1910, p. 42.

³ 1913 Agreement, Interstate Movement (Proceedings of the United Mine Workers, 1914, p. 44).

⁴ Machine Scale in Arkansas and Oklahoma, 1912, sec. 7, in Proceedings of the United Mine Workers, 1914, p. 71.

employment is quite general in mining communities. If an employer closes down one of his mines and continues others in operation, the men in the mine that is working will invite their fellow unionists where work has been stopped to share their employment with them. That is to say, the men who retain their jobs will remain at home three days each week, allowing the men out of employment to take their places for the remaining three days."⁵

These various rules have resulted in such a thorough-going distribution of employment that it would seem as though nothing could better the distribution short of an absolute limitation on daily earnings. It has been suggested that these regulations have had a tendency to retain so great a number of workmen in the industry that the earnings are not sufficient for proper living conditions. On the other hand, the conditions surrounding the industry are such that a greater number of workmen are needed at certain seasons. In the anthracite fields, production is more nearly regular throughout the year in consequence of a sliding scale of prices to the consumer, while in the bituminous fields the coal can only be mined as needed, because the atmospheric effects upon this grade of coal are such that for domestic purposes it must be consumed shortly after it is mined. Consequently, in the winter months there is needed a relatively larger force of bituminous than of anthracite miners.

The most significant case in which the policy of the unions towards the question at issue is revealed is in the garment industry. Since the signing of the agreement in 1911 between the Ladies Garment Workers and the employers of New York, the distribution of employment has been one of the chief contentions between the union and the employers' association. During the first nine months of the operation of the Protocol 186 of the 998 grievances submitted to the Board of Grievances were alleged discriminations in the distribution of work. From September to December, 1911, 53 of the 295 grievances were of the same character.⁶

⁵ The Bridgemen's Magazine, January, 1910, p. 12.

⁶ Bulletin of the Bureau of Labor, No. 98, p. 230.

Previous to 1911, when the workmen were poorly organized, the employer allowed the foreman in each department to distribute the work as best suited him. In one factory, the question of race decided who was to get the lion's share of the work; in another, it was a question of favoritism or, perhaps, a bribe to the foreman. Some piece workers were allowed to work the entire day and far into the night, while others, who were reporting each day to the factory, were refused any employment. To remedy these conditions, the Ladies Garment Workers Union insisted in the conferences preliminary to the signing of the Protocol upon a more equitable distribution of employment, and secured a rule which requires the employer to divide employment, as far as possible, among all regular piece and time workers.

The distribution takes the form of either short time or rotation of the workers. The manufacturers do not object strenuously to the application of this rule to piece workers, but have, by many subterfuges, attempted to evade its application to time workers. The difficulty has been the interpretation of the term "regular workmen." The union contends that this includes all who have been working for the employer, while the manufacturers claim that it only includes those who are employed during the slack seasons and does not include those taken on during the rush periods. In December, 1914, this question was submitted to the Board of Arbitration in the Cloak, Suit and Skirt Industry of New York. The Chairman, Mr. Louis D. Brandeis, gave the following decision: "Equal division of work is to be regarded as desirable and as necessary in this industry; for it must be acknowledged that it should be made possible for the people called into the industry, and who are regularly employed therein, to earn a reasonable livelihood." But as to what constituted a "regular" workman, the Board refused to give an interpretation, merely saying that this question "must be left to the judgment of men familiar with the particular facts, because the facts will vary in par-

ticular cases."⁷ Aside from this disputed question, the fifty thousand union ladies garment workers of New York are working under rules guaranteeing them a fairly equal distribution of employment. In the Boston Protocol of 1913,⁸ and in the Philadelphia Protocol of 1914,⁹ the union secured provisions for an equal distribution of work among its members. In other cities both the agreements with the employers' associations and with individual manufacturers provide for an equal division of employment.

The United Garment Workers and the Tailors have insisted at all times upon an equal distribution of work among their members, but they have not met with the same success as the Ladies Garment Workers, doubtless on account of the lack of general agreements with employers' associations. In their agreements with individual manufacturers, these unions have generally obtained an equal distribution of employment among the regular workmen; but with regard to what constitutes a regular employee, and as to when the workmen may be discharged on account of the reorganization of the factory, the unions and the employers have not been able to agree. Differences on these points have led to many strikes in the clothing industry. In Baltimore, in August, 1912, three hundred men went on strike because the firm insisted upon laying off a pocket maker instead of distributing the work among the fourteen members in this particular department. In 1914 another Baltimore employer attempted to discharge a certain number of men on account of "a reorganization of the factory." In this case the union asked for a distribution of the work, which the employers refused and the consequence was a strike involving two thousand men. Wherever possible, the unions have attempted to induce the employers to work short time instead of discharging a portion of the working force, and they have recently secured the acceptance of this policy by many employers.

⁷ Ladies Garment Worker, February, 1915, pp. 11-14.

⁸ Ibid., May, 1913, p. 17.

⁹ Ibid., October, 1914, p. 12.

The Cloth Hat and Cap Makers have always insisted upon the employment in the dull seasons of all members who were in the working force in the busy season. The union has secured the establishment of this policy in all shops where the workmen are paid piece wages, but has been unable to enforce it in the shops where time wages are paid.¹⁰ The Textile Workers Union recently demanded the incorporation in their agreements with the manufacturers of an article providing for equal distribution of employment. There was but little opposition, and the movement has been generally successful. Even in non-union establishments the manufacturers have followed this policy for many years, although they do not always include the entire working force, and sometimes leave certain employees out of the distribution.

The Glove Makers, in all of their agreements with the employers, have secured provision for an equal distribution of employment in the dull seasons. The employers are required to give to each piece worker not the same number of pieces but work which will yield equal wages.¹¹ While there is no written agreement between the Hatters and their employers as to the distribution of work in slack periods, there is, as President Lawlor terms it, "a gentleman's agreement" that short time will be worked in the dull months, and no employee may be laid off on account of such dullness.¹² One of the chief contentions in the great Danbury lockout of 1890 was over the distribution of work. The manufacturers claimed that they should be allowed to regulate the distribution of employment, while the union claimed an equal division of work.¹³ Since that time, with but few exceptions, the policy of equal distribution of employment among the entire working force has been accepted in full by the employers.

¹⁰ Interview with Secretary Zuckerman, August, 1915.

¹¹ Interview with Secretary Christman, August, 1915.

¹² Interview, August, 1915.

¹³ The Sixth Annual Report of the Connecticut Bureau of Labor Statistics, Part V, p. 191.

If the policy of equal distribution of employment is to be generally enforced in a trade, there is need for a strong organization of employers to deal with that of the workmen. In every trade there are certain employers who will accede to the demands of the union for the distribution of work; but there are also others who, although they may agree to the standard rate, the normal day, and union working conditions, will not readily relinquish their right to hire and discharge as they see fit. Consequently, there is a greater likelihood of finding the system of equal distribution of employment widely enforced in those trades where the associations of employers and workmen hold conferences and make agreements for the entire trade. The most striking examples of systems of this kind are in the pottery and glass industries.

The National Brotherhood of Operative Potters for many years unsuccessfully attempted to obtain the consent of the United States Potters' Association—the manufacturers of general ware—to incorporating in the agreements a rule requiring equal distribution of work among all employees. At the conference in 1911 the manufacturers agreed to adopt this rule and to work short time in the slack seasons, instead of continuing the practice of concentrating the work upon those favored by the foreman.¹⁴ The union also secured from the Sanitary Manufacturing Potters' Association at the conference in 1912 a rule similar to that in force in the general ware department, except that the work was to be divided equally among workmen making the same class of ware.¹⁵ For instance, if a manufacturer were to close entirely the lavatory ware department of his factory and retain jet makers at full time, the pressers in the former department would not share in the work. To this the union strongly objected, maintaining that as "the pressers are at

¹⁴ Agreement between the United States Potters' Association and the National Brotherhood of Operative Potters, Atlantic City, New Jersey, 1911, sec. 11.

¹⁵ Agreement between the Sanitary Manufacturing Potters' Association and the National Brotherhood of Operative Potters, 1912, p. 1.

all times expected and, in fact, compelled to make any kind of articles given them," the work of the entire plant should be equally divided among all those competent to do it.¹⁶ The Potters on several occasions have struck to enforce the rule requiring an equal distribution of work. For example, in March, 1914, the pressers in one of the Trenton potteries struck because several pressers had been discharged by the firm on the ground that the force was larger than was needed.¹⁷ In April of the same year the pressers in a pottery at Mannington, West Virginia, went on strike for reasons connected with the rule.¹⁸

In the Flint Glass Workers' Union the necessity for some rule under which its members might be guaranteed more continuous employment was early recognized. Glass factories do not produce at maximum capacity during more than six or eight months even in the most prosperous years. In 1897 President Smith said that the existing custom was for the employers to lay off a certain number of their workmen when trade slackened, and to retain on full time those who stood highest in the estimation of the foreman. Almost invariably the slow workers, or those who "had suggested that the employees have rights that should be respected," were among those laid off. This custom, in the opinion of the president, was so strongly entrenched in the trade by long usage that there was great doubt as to the possibility of establishing any better system.¹⁹ However, the convention of that year proposed that all departments should attempt to induce the employers to distribute fairly the work.²⁰ Since then each of the sixteen departments of the industry, at their conferences with the employers, have obtained rules providing for an equal distribution of work. Most of the agreements provide for distribution among all who are found competent, regardless of the class of work

¹⁶ Proceedings, 1914, pp. 76-77.

¹⁷ Potters' Herald, March 26, 1914, p. 2.

¹⁸ Ibid., April 23, 1914.

¹⁹ Proceedings, 1897, pp. 57-58.

²⁰ Ibid., 1897, p. 175.

at which they were formerly employed. The cutters and mould makers, however, have less stringent rules. In the former department, the employer is allowed in a period of slackness to lay off the men engaged during a rush period, provided such employment was for less than four weeks.²¹ In the Mould Making Department an employer is required to share the work among all the working force except workmen who have not held their positions for six months.²²

The rule has led to many disputes between the employers and the union, and even between different factions in the union. The controversies became so numerous that at the conference in 1911 between the manufacturers and the union the interpretation of the rule was brought up for settlement. The conclusion which was reached in conference was rejected on reference by both the manufacturers and the union. The only provision which was accepted by both parties was that "whenever the necessity for a division of time arises, the factory committee and the management shall agree on a satisfactory division."²³

In the iron and steel industries, the practice of working short time in periods of depression has become a generally accepted policy in many union and non-union mills. However, the manufacturers have frequently used other means of curtailing production, such as running single instead of double turn, and of closing a certain number of their furnaces. The Iron, Steel and Tin Workers' Union adopted in 1886 the following rule to cover such cases: "Should any department of a mill be stopped running single or double turn, through over-production, or other causes, the work shall be equally divided, except where a furnace is out for repairs."²⁴ The union has also provided that any mill, running double or triple turns during three or more months of the year, shall be considered a double turn mill, and in the event of such a mill going on single time, the work shall

²¹ Proceedings, 1913, p. 216.

²² Proceedings, 1912, p. 167.

²³ Proceedings, 1912, p. 97.

²⁴ Proceedings, 1886, p. 1851.

be divided equally among the different crews.²⁵ For many years, through the influence of the members who were holding regular positions, this rule was not obeyed by many of the local lodges. There was also disagreement as to the proper method of dividing the work. Various plans were adopted. In some mills the men worked in rotation, while in others three and four shifts were worked. In the period of depression from 1893 to 1896 the mills worked short time, but did not employ the men laid off on account of the closing of certain furnaces. President Garland of the Amalgamated Association advocated the adoption of a three-shift system and it appears that this plan was put into effect in many mills, for the president reported to the convention in 1898 that seventy-five per cent of the members were then working under the three-shift system.²⁶ At the convention of 1900 several lodges asked for the privilege of working four shifts in order to help the great number of unemployed, but they were advised to divide the work in some other manner.²⁷ During 1901 many lodges reported that they had formed floating crews from those who had worked at furnaces which were then idle, and allowed them to work in rotation with the regular crews.²⁸ This method was suggested to the American Tinplate Company by President Garland when he went to New York in 1901 to plead the cause of the unemployed.²⁹ At present the manufacturers and the union have agreed that, in all cases, the work shall be distributed among all of the workmen, except those who have not been members of the union for thirty days.

The general trade agreement between the Glass Bottle Blowers and the employers provides for the employment of idle men by changing the factory from a two to a three shift system in dull seasons. When this is not practicable, the shop committee and the manufacturer are to arrange

²⁵ Constitution, 1913, art. 17, sec. 6.

²⁶ Proceedings, 1898, p. 5418.

²⁷ Proceedings, 1900, p. 5839.

²⁸ Amalgamated Journal, February 14, 1901, p. 18.

²⁹ Ibid., p. 20.

some other method for an equal division of employment among the workmen.³⁰ In consequence of the introduction of automatic machinery, the three-shift system has been widely established as the normal arrangement throughout the year. Where this is the case the distribution of work on account of seasonal variations must be accomplished in some other manner. Another rule agreed to by the manufacturers provided that when a majority of blowers in a factory agree to do so, the work may be divided among all. It appears, however, that this rule is enforced in only a small part of the factories. President Hayes in 1908 referred to several instances in which the local unions had asked for an equal distribution of employment and the employers had acceded to their request, but many of the local unions did not avail themselves of this opportunity.³¹ At the convention in 1914 President Hayes urged the members to pay more attention to this provision,³² but it appeared that some of the members were not in favor of dividing work because of its tendency to keep in the trade more men than necessary.

As stated above, there are very few trades outside of the building trades,³³ in which short time is not worked in particular cases. The practice is found among the Stove Mounters, Paper Makers, Coopers, Leather Workers on Horse Goods, Metal Polishers, Lithographers, Boot and Shoe Workers, Photo-Engravers, Lace Operatives, Laundry Workers, in the stove branch of the Iron Molders, and to a less extent, among the Bakers, Bookbinders, Pattern Makers, Commercial Telegraphers, and the Street Railway Employees.

The second method by which employment is distributed—the system of rotation—is less prevalent than the working

³⁰ Wage Scale and Working Rules, Glass Vial and Bottle List, for the Blast of 1913-1914, sec. 14, p. 76.

³¹ Proceedings, 1908, p. 54.

³² Proceedings, 1914, p. 109.

³³ An exception in the building trades appears to be the Granite Cutters. On several occasions some of the local unions have provided for a temporary shortening of the working day from eight to six hours, in order to provide work for the unemployed. For example, see Granite Cutters' Journal, April, 1915, p. 4.

of short time. When the charges for lighting, heating, superintendence, etc., are fairly constant whether the employer is working his full force or only a portion of it, it is obvious that it would be a considerable saving were he to operate his plant on part time with the full force, instead of operating full time with a portion of the force. On the other hand, when conditions in the industry are such that it is necessary to maintain an average daily output in the dull season, or when it is economical to keep a portion of the machinery in operation continuously, the method of rotation is more advantageous to the employer than the working of short time.

These considerations are well illustrated in the case of the Brewery Workers. Here the manufacturers desire the uninterrupted operation of their breweries on account of conditions growing out of the methods of brewing and out of the regularity of sales of their product. For many years prior to the formation of a strong organization among the brewery workers, the employers generally met the slack season by a dismissal of a part of their working forces. Inasmuch as this frequently resulted in the laying off of one half of the force, the organized workers demanded a more equitable distribution of employment during the winter months. By 1901 the demands of the union had resulted in the incorporation in the majority of agreements with the employers of a rule requiring an equal distribution of work among the entire working force in the slack season. The secretary reported to the convention in 1901 that "almost every contract now contains a clause providing that during the slack times in winter, comrades shall be laid off alternately for a week at a time."⁸⁴ Employers of large breweries have only occasionally objected to this method of meeting seasonal fluctuations, but in small breweries the union has always had to struggle for the acceptance of the rule. There are usually only a few thoroughly competent brewers in a small brewery, and their work is divided in such a man-

⁸⁴ Proceedings, 1901, p. 49.

ner that when some of them are laid off the efficiency of the working force is greatly impaired. To meet this condition, the union has conceded that short time may be worked in those breweries where rotation is impracticable. Even where the system of rotation is practised, the union has insisted on a reduction in working hours from nine during the busy season to eight in the winter, and has prohibited the working of any overtime when the men are working short time or in rotation.

The adoption of these methods of meeting seasonal fluctuations in the brewery industry is due to the constant struggle of the union. As the general secretary has said, "the master brewers have worked tooth and nail to eradicate the lay-off clauses in the agreements."⁸⁵ Recently the members of the union in Washington, D. C., and Wilmington, Delaware, have been locked out because of their insistence upon an equal distribution of employment. In Washington the employers wished to discharge a certain percentage of the workmen and to divide the employment among the remaining working force; but the union refused to accede to anything except a division of the work among the original working forces.⁸⁶ Secretary Proebstle of the Brewery Workers says that the union attaches the same importance to the question of distribution of employment as it does to wages and hours, for without the maintenance of this policy, the workmen would be unable to provide proper living conditions.⁸⁷

The Amalgamated Glass Workers' Union compels its subordinate local unions to insert in their agreements with the employers a clause providing for an equal distribution of work in the slack season.⁸⁸ This generally takes the form of rotation, although in several cases, as for example, in the 1914 agreement with the employers of Cincinnati, Ohio,

⁸⁵ Reports of the General Secretary-Treasurer in the Proceedings, 1903, p. 157.

⁸⁶ For a complete description of the lockout, see *Brauerei-Arbeiter Zeitung*, April, 1915.

⁸⁷ Interview, August, 1915.

⁸⁸ Constitution, 1913, sec. 151.

it is provided that "in dull times the working hours shall be reduced so as to give each member employed an equal amount of working time."³⁹ Several of the unions chartered by the American Federation of Labor, such as the Crown Cork and Seal Operatives, and the Watch Case Engravers, provide for rotation in the dull seasons, and, as has been pointed out above, the Ladies' Garment Workers, the Iron, Steel and Tin Workers, the Glass Bottle Blowers, and the Flint Glass Workers combine the method of rotation and the method of short-time.

The third method by which distribution of employment is accomplished—short time to meet a slight fluctuation, but dismissal of workmen to meet a longer fluctuation—is very common. It is obvious that this method will be preferred in those trades in which it is particularly desirable to retain the most valuable workmen. In the mechanical departments of the railroads and, in fact, in the majority of shops where members of the Boilermakers, Machinists, Iron Molders, Blacksmiths, Metal Polishers, Sheet Metal Workers, and Pattern Makers are employed, this method is in general practice. A typical agreement is that between the Rock Island Federated Trades and the Chicago, Rock Island and Pacific Railway, as follows: "When reducing expenses, the full force of men will be retained, and reduction made in hours until the number of hours shall have reached forty per week; but any further reduction will be made by laying off men, seniority and ability to govern."⁴⁰ Occasionally the reverse of this method is employed; that is, a slight fluctuation is met by a dismissal of workmen, while any further fluctuation is provided for by the working of short time. This is less likely to meet the approval of the workmen, but is more advantageous to the employers in that they are enabled to dismiss the less efficient at the first opportunity.

The "five-day" rule of some of the local unions of the

³⁹ Agreement between the Cincinnati, Ohio, local union of the Amalgamated Glass Workers and the employers, 1914, art. 6, sec. 1.

⁴⁰ Boilermakers' Journal, February, 1912, p. 107.

Typographical Union is an interesting example of this method. This rule has grown out of the "six-day-law" which was discussed in a previous chapter. Its operation is limited to seasonal fluctuations and periods of general industrial depression. Under the rule, those who are regularly employed are obliged to give to the unemployed the opportunity to work one day each week, the regular force being limited to five days employment. The employers have strenuously objected to this rule and a number of local unions that have adopted it in periods of unemployment have been forced to abandon it, either because the unemployed were attracted from other cities, or because of the employers' objections.⁴¹ When on December 27, 1914, the 180 printers employed in the three newspaper plants of New Orleans were locked out, one of the important contentions was that the local union had passed a rule compelling its members to share all work beyond forty hours per week with the unemployed.⁴² The employers declared that the local union had abrogated the contract existing between the employers and the union "by passing and arbitrarily putting into effect a five-day law in our several offices," thus "disturbing the working conditions therein at an increase of expense to the publishers and a decrease of the efficiency of their respective composing rooms."⁴³ The five-day rule is found to a limited extent in some other unions, as for instance, in many local unions of the Bakers during the dull seasons.

Despite the wide prevalence of systems of distribution, the commonest means of reducing the production of the working force is to discharge part of the force. This method not only exists among the unskilled and the unorganized, but in well-organized and skilled trades. It is the almost universal custom among the thousands of workmen in the building trades and is accepted by many of the strongest unions. Such strong unions as the Printers and the

⁴¹ Barnett, *The Printers*, p. 225.

⁴² *Typographical Journal*, March, 1915, p. 344.

⁴³ *Ibid.*, February, 1915, p. 174.

Railroad Brotherhoods in their agreements with employers concede to the latter the absolute right to discharge as many as they please in the dull seasons, merely asking that the seniority rights of the workmen be respected. Thus, the majority of the members of the American unions, it may be safely said, are not affected by rules which provide for a distribution of employment.

In view of the widely varying practices of the unions, it is pertinent to inquire what are the differences among the trades and industries which lead to these differences in trade-union policy. Broadly speaking these trade characteristics are as follows:

(1) The greater differences in efficiency among workmen in one trade than in another.

(2) The greater value, other than general efficiency, of certain workmen to a particular employer.

(3) The greater expense and difficulty incurred in recruiting the working force in the busy seasons.

(4) Differences in the factors affecting overhead charges.

1. The first set of factors is, without doubt, the dominating influence in the greater number of cases. The capacity of workmen varies considerably in some trades. The extent of this difference depends chiefly upon the character of the trade, it being greater in those cases where the skill of the workman is the controlling factor in production. Inasmuch as the members of unions are employed at standard rates, and as this minimum has generally become the maximum, the employer is usually paying different wage rates per unit of efficiency to his various workmen. Therefore, when an employer is forced to curtail production, it is more economical for him to dismiss those workmen who are less competent than to retain the entire force either on short-time or in rotation. The differentiation in favor of the more competent is, of course, greater in those trades where time-wages are paid. It is therefore to be expected that the dismissal of workmen in the slack seasons will be found more frequently where time-wages are paid, and that short-

time and rotation will be more common in industries where piece-wages are paid. Of the twelve unions whose members work short-time in periods of seasonal and cyclical fluctuations, ten are in trades paying piece-wages; and one of the two unions whose members work in rotation in the dull seasons is a trade with piece-wages.

A union whose experience illustrates the difficulty of forcing the working of short-time where time-wages are paid and the comparative ease of enforcing it among piece-workers, is the Ladies' Garment Workers of New York. The protocol of 1911 provided for an equal distribution of work among the entire working force, but the union soon found that, although the manufacturers retained all the piece workers in dull seasons, many of the employees who were paid time-wages were being discharged. The employers were reluctant to keep all of the time-workers since many of them were not worth the standard rate of pay in the dull season. The Cloth Hat and Cap Workers' Union has similarly been unable to enforce in shops paying time-wages its rule requiring an equal distribution of employment while those shops where piece-wages are paid have not objected to the rule.⁴⁴ The secretary of the Lithographers, also, states that the only reason that the Lithographers have been unsuccessful in their attempts to secure an equal distribution of employment in the slack seasons is that they are paid time-wages.⁴⁵

It is not to be inferred, however, that all piece-working trades can enforce distribution of employment. For here, too, the inferiority of some workers to others may play a prominent part. It is said that the daily product of glass blowers varies as much as fifty per cent between one workman and another, and as the costs for heating a tank of glass and other incidental expenses are the same for the man who blows five gross of bottles as for the man who blows ten, it is obvious that the employer would prefer to reduce his working force instead of working short-time.

⁴⁴ Interview, August, 1915.

⁴⁵ Interview with Secretary O'Connor, August, 1915.

2. In many skilled trades the class of work varies considerably from one shop to another and an employee of one concern may be obliged to familiarize himself with the conditions peculiar to that establishment. These peculiarities may relate to the machinery, the process, the materials or even the patrons of the company. Through a knowledge of these conditions many workmen are an indispensable part of the concern. In such cases the employer will be more likely to use the method of short-time or of rotation rather than to dismiss a part of the working force, because when the full force is again required he may not be able to secure the services of the dismissed men.

3. In trades where an employer can reasonably expect to recruit his working force with but little difficulty or expense, there is less incentive for him to work short-time in the dull seasons. This is the case generally with employers of unskilled and semi-skilled workmen. So far as skilled workers are concerned much depends upon the size of the industrial community and the normal reserve of labor. When there is more than one establishment in a community, there is a greater probability that workmen can be obtained when they are needed. When a workman is dismissed from the only establishment in his community at which he can secure employment, he will generally move to a community where his chances for employment are greater. The primary reason for short-time employment among the coal and ore miners, textile, and lumber workers, is that the employers are forced to give to each workman some employment to induce him to remain in the community, in order that his services may be available in the busy season. In the large industrial centers employers are not generally forced to adopt this policy, because the normal reserve of labor is sufficient to furnish the number of workmen which will be required when he increases his working force.

4. In some industries there are important expenses which are constant, regardless of the number of workmen employed. Thus, charges for light, heat, power, superintend-

ence, and subsidiary labor may involve such an expense that it will be more economical for the manufacturer to employ the entire force on short time, as for example, every other week, than to work full time, dismissing the less efficient workmen. In other industries this expense may be so small as to have no influence upon the method to be used.

Throughout this chapter the attempt has been made to show the position of the unions in the demand for an equal distribution of employment in the dull seasons. Naturally stress has been laid on the objections of the employers, but in the unions themselves there are certain influential elements which have steadily opposed a more equitable distribution of employment.

In the greater number of local unions there are certain members comprising the more efficient workmen, who dominate the business transacted by the union. Whenever the seasonal fluctuation is of such intensity as to cause the dismissal of some of these "regulars," the local union is insistent upon an equal division of employment. But when the fluctuation results merely in the discharge of a few men who are "floaters" or young members, the action of the local union is likely to be different. In these cases the regulars strenuously object to a division of employment and frequently refuse to abide by the rules of the national union upon the subject. The Flint Glass Workers at their convention in 1902, in the hope of discouraging such violations of the rule of equal division, directed one of the local unions to pay two weeks wages to a member whom they had not allowed to share in the division of work.⁴⁸ Such practices still exist, however, for the president in 1915 said: "Our attention has been called to the fact that in certain localities, the members of the cutting department attempt to evade the equal division of time rule by catering to the foreman of the shops and receiving favorite treatment from the managers. Conduct of this kind is absolutely wrong, and

⁴⁸ Proceedings, 1902, p. 381.

displays a weakness in trade union principles."⁴⁷ The members of the Typographical Union voted in 1908 to continue the enforcement of the priority rules, which are a great hindrance to the equal distribution of employment, especially among the substitutes.⁴⁸

The Railroad Brotherhoods, Boilermakers, Iron Molders, Machinists, and other unions still retain in their agreements provision for the seniority rights of members in dull periods. And even where equal division is the rule, it is extremely difficult of enforcement on account of the hostility of the more efficient workmen. An official of the Brewery Workers says: "This new mode of laying off has caused much dissatisfaction, which certainly is not in accord with the socialistic principles which our organization pretends to advocate, and should not reveal itself so openly."⁴⁹

Despite these influences within the unions, however, the agitation for an equal distribution of employment in the dull seasons is gaining great strength. Responsibility for introducing and promoting distribution must in great measure be placed on the unions. In only one of the fourteen industries represented by unions whose members work on short-time and in rotation during dull seasons, is it likely that these methods of meeting the contraction of demand would have been instituted and maintained without the influence of the unions. Conclusive evidence of this is found in the fact that the majority of non-union establishments in these thirteen trades dismiss a part of their working forces in the slack seasons instead of working on short-time or in rotation.

⁴⁷ Circular of the Flint Glass Workers' Union, Number 13, February 20, 1915, p. 1.

⁴⁸ Typographical Journal, vol. 32, p. 645.

⁴⁹ Proceedings, 1903, p. 199.

CHAPTER VI

UNEMPLOYMENT INSURANCE

The development of beneficiary features in American trade unions has been far slower than in the European trade unions. Of the 111 national unions affiliated with the American Federation of Labor in 1916 only 69 were reported as paying benefits of any kind, and of these 35 had established only one form of benefit. Only 9 unions reported that they had expended anything for the support of their unemployed. The expenditures for beneficiary features of these 69 unions were \$3,545,823 for the year 1916, and of this sum only \$120,770 or about three per cent was for the relief of the unemployed.¹

In 1908, 669 of the 1058 trade unions in Great Britain paid some form of unemployment benefit. The total expenditures in 1908 in England for this benefit alone was \$6,289,565 or \$2.75 per capita. This comparison shows the relatively small importance which American trade unions attach to organized out-of-work relief. In the 100 principal trade unions of England, which represent about 60 per cent of the total membership, the total amount of unemployment benefits paid during the three years 1908-1910 was \$13,250,000, which was 31 per cent of all expenditures.²

There are only three American national unions which at this time, 1916, are paying out-of-work benefits—the Cigar Makers, the Deutsch-Amerikanischen Typographia, and the Diamond Workers.³

¹ Report of Secretary, in Proceedings of the Thirty-sixth Annual Convention of the American Federation of Labor, 1916, p. 31.

² The 17th Report on Trade Unions of Great Britain. Report on Trade Unions in 1908-1910, pp. iii, xxi, xxxiii.

³ Both the Coal Hoisting Engineers, which disbanded in 1904, and the Jewelry Workers, which disbanded in 1912, paid out-of-work

For many years prior to the adoption of this form of benefit by the Cigar Makers, several of the local unions of cigar makers had formed systems of their own. As early as 1875 the New York branch provided that members who had been unemployed for two weeks were entitled to receive benefits for a term of three weeks.⁴ At the convention in 1876 Mr. Samuel Gompers, then secretary of the New York City local union, proposed a national out-of-work benefit modeled upon the New York system, but the proposed benefit received scant attention.⁵ During the following years several other local unions adopted the New York plan and the movement for a national out-of-work benefit found many adherents.⁶ President Hurst recommended to several conventions that the local unions be allowed to vote upon the question but the opponents of the plan declared that the higher dues necessitated by the proposed benefit would force many members from the union, and defeated the measure.⁷ President Strasser and other officials argued in favor of an out-of-work benefit at every convention, but it was not until the eighteenth convention, held in September, 1889, that the benefit system as framed by Mr. Gompers was adopted.⁸

The system which went into effect in January, 1890, provided that unemployed members who had paid dues for one year were entitled to \$3.00 per week and 50 cents for each additional day, the benefit beginning with the second week of unemployment. After receiving benefits for six consecutive weeks the member was not entitled to any benefit for seven weeks thereafter, and the maximum amount to be received in one year was \$72.00. No benefit was to be paid from December 16 to January 15 and from July 1 to July 15, as manufacturers generally closed their shops dur-

benefits. The British trade unions which have members in the United States—the Amalgamated Carpenters and the Amalgamated Engineers—provide for unemployment insurance.

⁴ Cigar Makers' Journal, February, 1889, p. 8.

⁵ Ibid., September, 1876, p. 1.

⁶ Ibid., April, 1877, p. 1.

⁷ Ibid., April, 1879, p. 4.

⁸ Proceedings of the Eighteenth Convention, 1889, p. 18.

ing these periods. If a member was thrown out of employment on account of intoxication, disorderly conduct, or bad workmanship he was not entitled to any benefit for eight weeks, but inability to hold a job did not deprive a member of his benefit. Those receiving benefits were required to report daily at the secretary's office and sign their names in a book provided for that purpose. Members were not entitled to the benefit if they refused to work in a shop where work was offered, or neglected to apply for employment in a shop if directed to do so by an officer of the local union.

The system was successful from the beginning, although many attempts were made to break down the safeguards established for its proper management. At the convention in 1891 it was provided that a member must procure from the collector of the shop in which he was last employed a certificate stating the cause of his discharge, and that if any member failed to register for three successive days the benefit of previous registration was forfeited, if such registration was for less than one week.⁹ On account of the great increase of out-of-work benefits paid in 1894, 1895, and 1896, the convention in the latter year voted to reduce the expenditures for this benefit. This was done by restricting the benefit to cigar makers of two years' membership, by reducing the maximum amount to be drawn in one year from \$72.00 to \$54.00, and by extending the periods during which the benefit was not to be paid.¹⁰ The system has remained unchanged since the convention of 1896.

During the first year of its operation \$22,760 was paid to 2286 members, or less than 10 per cent of the membership. The per capita cost for the first year was 92 cents, 87 cents for the second year, and 65 cents for the third year. During the depression of 1893-1896 the cost increased greatly, there being expended in 1896 \$175,767 or \$6.43 per capita. Since then the cost has gradually diminished, and except for the years 1908, 1909, 1912, and 1914, has never exceeded

⁹ Proceedings of the Nineteenth Convention, 1891, p. 23.

¹⁰ Proceedings of the Twenty-first Convention, 1896, p. 31.

\$1.00 per capita. The system had been in operation twenty-five years on January 1, 1915, and had cost the union \$1,-486,732, or an average annual per capita cost of about \$1.90.

The Deutsch-Amerikanischen Typographia established its out-of-work benefit in 1884, eleven years after the national union was founded. As was the case with the Cigar Makers, the system was modeled after a benefit in operation in one of the local unions. The only changes which have been made in the original plan have had to do with the amount of the weekly benefit. At the outset the benefit was fixed at \$5.00 per week, but as it was found that the assessments more than paid for the system, it was increased in 1888 to \$6.00 per week. However, in 1894 the weekly benefit was reduced to the original amount on account of increased payments due to the general business depression and to the introduction of the linotype. In 1908, owing to the prosperous financial condition of the union, it was again raised to \$6.00 per week where it has since remained.

The operation of the system at present is in many respects similar to that of the Cigar Makers. Unemployed members who have been in good standing for two years are entitled to \$6.00 per week, beginning with the fourth week of unemployment. After having received benefits for four weeks, a period of three weeks must intervene before the member is again entitled to the benefit, and the amount received during the fiscal year cannot exceed \$96.00. Members who are unemployed through their own fault are not entitled to the benefit until they have been on the unemployed list for seven weeks, but if the situation has been voluntarily given up, the member is allowed to draw the benefit after a period of four weeks. The secretaries of the local unions specify certain hours of the day during which the unemployed must register at the union offices. Should the member receive employment for one day while on the unemployed list, \$1 is deducted from his weekly benefit, but four days' employment in one week debars him from any benefit for that week. Members who refuse to accept a situation are not allowed to

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register for a period of six weeks, while refusal to work as a substitute debars from the benefit for two weeks. Inability to hold a position debars a member from any benefit, and only through the action of the local union can he be given any financial assistance.

The cost of the out-of-work benefit in the Cigar Makers' Union and in the Typographia is shown in the following table:

COST OF MAINTAINING THE OUT-OF-WORK BENEFIT

Year	Typographia		Cigar Makers	
	Total Cost	Per Capita Cost	Total Cost	Per Capita Cost
1885	\$ 1,118.90	\$ 2.00		
1886	1,453.08	1.52		
1887	1,240.10	1.15		
1888	1,315.13	1.16		
1889	6,281.50	5.55		
1890	4,315.00	3.47	\$ 22,760.50	\$.92
1891	6,067.00	4.58	21,223.50	.87
1892	9,359.50	6.77	17,460.75	.65
1893	7,835.00	5.67	89,402.75	3.34
1894	17,262.50	14.33	174,517.25	6.27
1895	9,464.20	8.66	166,377.25	5.99
1896	7,812.00	7.00	175,767.25	6.43
1897	8,485.00	7.83	117,471.40	4.46
1898	8,603.00	7.82	70,197.70	2.65
1899	11,135.00	10.39	38,037.00	1.31
1900	8,703.00	8.33	23,897.00	.70
1901	6,716.00	6.56	27,083.76	.79
1902	7,839.00	7.86	21,071.00	.56
1903	4,846.00	4.86	15,558.00	.39
1904	5,785.00	5.82	29,872.50	.72
1905	5,105.00	5.23	35,168.50	.87
1906	5,086.00	5.22	23,911.00	.61
1907	3,802.00	3.84	19,497.50	.47
1908	6,585.00	6.78	101,483.50	2.51
1909	6,350.00	6.69	76,107.25	1.71
1910	4,011.00	4.34	39,917.00	.91
1911	3,401.00	3.70	36,942.50	.88
1912	3,670.00	4.13	42,911.05	1.06
1913	3,248.00	3.64	31,808.71	.79
1914	3,188.00	3.59	68,198.00	1.70
Total	\$180,081.91		\$1,486,732.62	
Average	6,002.73	5.61	59,469.30	1.90

Some comparison can be made of the cost of the out-of-work benefit in the two unions. During the twenty years existence of the Cigar Makers' system the average annual per capita cost has been \$1.90, while the average annual per capita cost of the German Printers has been \$5.61. But this great difference has not been due chiefly to a greater amount of unemployment, although the printers are more subject to unemployment than the cigar makers. The weekly benefit of the Cigar Makers is only one-half of that of the Typographia, while the maximum yearly benefit is only about sixty per cent as great.

During the past few years there appears to have been a tendency towards decreased per capita costs in both unions. This is partly due in the case of the Cigar Makers to a more stringent administration of the system, while in the Typographia it is the result of the introduction of the old age pension in July, 1908. Secretary Miller of the Typographia says that the majority of the members receiving the benefit for the unemployed are the older men who are unable to operate typesetting machines, and that before the introduction of the old age pension these members drew the maximum out-of-work benefit each year.¹¹

As the periods in which the two unions have paid unemployment benefits are about the same, it is not surprising that there is a striking correspondence between the fluctuations in their per capita costs. Both fall and rise together throughout the twenty-five years. From 1892 to 1894 the Cigar Makers' per capita cost rose from 65 cents to \$6.27 and the Typographia's from \$6.77 to \$14.33, while from 1899 to 1907 the cost of the Cigar Makers decreased gradually from \$1.31 to 47 cents and that of the Typographia from \$10.39 to \$3.84. Both rose during the panic of 1907-1908 and have since decreased gradually.

The Diamond Workers' Union, organized in 1902, established an out-of-work benefit in 1912. The system went into effect on August 1, 1912. It provided that the out-

¹¹ In letter to the writer, October 19, 1915.

of-work fund should be maintained by assessments of ten cents per week upon all employed members. Those members who had been employed for thirteen full weeks during the first half-year of their membership and who had been unemployed for six consecutive weeks were entitled to benefits. The unemployed were to receive a benefit of \$6.00 per week and \$1.00 for each additional day of idleness, but could not draw benefits for more than thirteen weeks, or seventy-eight working days, during the fiscal year. Members drawing benefits who found employment for four consecutive weeks or more were not entitled to an additional benefit until they had been idle for six additional consecutive weeks, while those who had been drawing the benefit and received work for less than four weeks were not to receive the benefit until they had been idle for as many days as they had been employed. Members who had resigned from their employment without reasons satisfactory to the executive board or who had courted their discharge were excluded from the benefit, and those who refused to accept employment when offered forfeited all rights to the benefit during the fiscal year. Those receiving the benefit were compelled to report at the headquarters of the union every Tuesday and Friday between the hours of 10 and 12 A.M.¹²

Several important changes in the system have been made since its establishment. In July, 1913, the weekly benefit was increased from \$6.00 to \$7.50, and members became entitled to the benefit after they had been unemployed for four weeks instead of six weeks.¹³ At first it was thought that with an initial donation of \$600.00 to the fund from the general funds of the union the assessment of ten cents per week would be sufficient to defray the expenses of the benefit system. It appears that in normal times the income from this source was sufficient to cover the expenses, but during the depression of 1914-1915 the expenditures for the

¹² Circular of the Diamond Workers Protective Union of America (New York, n. d.).

¹³ Letter to the writer from President Andries Meyer, March 7, 1916.

benefit were so large that it was necessary to transfer large sums from the general fund of the union to the out-of-work fund. Thus, from January 1, 1914, to March 31, 1915, \$22,600 was drawn from the general fund for the use of the out-of-work benefit.¹⁴ In 1916 the employed members were assessed \$1.00 per week besides the regular dues in order to provide new resources for the out-of-work fund.¹⁵

The following table shows the amounts paid since October 1, 1912:

OUT-OF-WORK BENEFITS PAID BY THE DIAMOND WORKERS' PROTECTIVE UNION

Quarter Ending	Amount
December 31, 1912	\$ 435.00
March 31, 1913	78.00
June 30, 1913	36.00
September 30, 1913	181.25
December 31, 1913	567.50
March 31, 1914	3,041.25
June 30, 1914	4,863.75
September 30, 1914	7,163.75
December 31, 1914	7,213.75
March 31, 1915	2,622.50
June 30, 1915	96.25
September 30, 1915	670.00
December 31, 1915	258.70
Total cost	<u>\$27,227.70</u>
Average per capita	<u>\$ 86.43</u>

Although but three national unions have established out-of-work benefits, a great many, at one time or another, have made special provision for the unemployed by donating money for this purpose from the general funds of the union. These emergency benefits have usually been put into operation during periods of general business depression.

The following table shows the total annual amounts including regular benefits and special appropriations, which have been appropriated for the relief of the unemployed by the unions reporting to the American Federation of Labor.

¹⁴ Quarterly Financial Statements, Jan. 1, to Mar. 31, 1914; Jan. 1 to Mar. 31, 1915.

¹⁵ Letter to the writer from President Andries Meyer, March 7, 1916.

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UNEMPLOYMENT BENEFITS PAID BY UNIONS REPORTING TO THE AMERICAN FEDERATION OF LABOR, 1903-1916

Year	Amount	Year	Amount
1903	\$ 79,538.37	1911	\$218,742.71
1904	78,073.25	1912	215,398.60
1905	85,050.72	1913	69,445.70
1906	79,582.70	1914	99,024.88
1907	46,481.79	1915	256,002.29
1908	205,254.31	1916	120,770.60
1909	484,028.49	Total.....	\$2,235,202.41
1910	197,808.00	Average.....	\$159,657.32

Typical examples of emergency funds for the unemployed are those of the Flint Glass Workers and the Glass Bottle Blowers. The general business depression of 1907 closed many factories in which members of the Flint Glass Workers were employed and the national union was besieged with appeals from the unemployed who numbered over thirty per cent of the membership. A relief fund was established and about \$5,000 was donated monthly to the unemployed until business conditions improved.¹⁶

During the same depression the Glass Bottle Blowers were confronted with a situation not unlike that of the Flint Glass Workers. The general office received so many applications for help that the executive board, on January 7, 1909, decided to establish a fund for the relief of the unemployed by increasing the assessment upon the earnings of those employed. Within a few weeks after its establishment 3200 of the 8200 members were receiving relief. The unemployed married members were given \$7.00 per week and the unemployed single members, \$5.00 per week for an indefinite period. During the period in which relief was granted there was expended \$260,502.75.¹⁷ During the depression of 1914-1915 the national union loaned money to the local unions to relieve the unemployed. In 1914 the sum of \$9,890.13 was expended,¹⁸ while in 1915 the expenditure

¹⁶ Proceedings, 1908, p. 91 et seq.

¹⁷ Proceedings, 1910, pp. 50, 70.

¹⁸ Proceedings of American Federation of Labor, 1914, p. 29.

amounted to \$55,000.¹⁹ Although this money was to be repaid, it is said that there is very little likelihood that this will be done.

Although the out-of-work benefit has been utilized so little by the American trade unions, there is scarcely a union in which there has not been a more or less continuous agitation for its adoption. These campaigns have been waged not only in the unions which were in existence when the Cigar Makers and the Typographical adopted the benefit, but also in unions founded within the last fifteen years. The agitation has been greatest during periods of general business depression, but it goes on even in the most prosperous years.

The Brotherhood of Carpenters and Joiners affords an illustration of this continuous agitation. P. J. McGuire, the founder of the union, advocated the establishment of an unemployed benefit. In the conventions of 1894 and 1896 he expounded its advantages and recommended its adoption, but each time the proposed benefit was defeated.²⁰ President Lloyd at the New York convention of 1898 urged the delegates to establish a benefit for the unemployed, and this time the question was submitted to a referendum vote but was defeated.²¹ During the panic of 1908 Secretary Duffy reported to the convention that he heartily favored some plan whereby the union might be able to give aid to the unemployed.²² At almost every convention since, the question has been debated and in many of the issues of *The Carpenter* there are letters from members urging the union to adopt some form of unemployment insurance.

The Typographical Union, which has an extensive benefit system, has frequently considered the advisability of establishing an out-of-work benefit. Its officers, like those of the Carpenters, have been the most aggressive exponents of the advantages to be derived from such action. President

¹⁹ Proceedings of American Federation of Labor, 1915, p. 30.

²⁰ *The Carpenter*, January, 1908, p. 10.

²¹ Proceedings, 1898, p. 8.

²² Proceedings, 1908, p. 5.

Prescott at the convention of 1894 urged the members to adopt the out-of-work benefit instead of the sick benefit.²³ During the period in which the linotype was displacing great numbers of printers the agitation for an out-of-work benefit became general throughout the union, but each time it was put to a vote of the membership it was defeated. As late as 1907 President Lynch said: "It has long been the belief of the president that the Typographical Union is great enough, experienced enough, and in the possession of the necessary machinery, to establish and successfully carry on an out-of-work benefit."²⁴ During the depression of 1914 many letters were written to the Typographical Journal urging the adoption of this benefit, and the convention of 1915 provided for the appointment of a committee to investigate the feasibility of establishing an out-of-work benefit for the International Union.²⁵

When the Plumbers in 1899 decided to inaugurate a system of benefits, a campaign was made for the out-of-work benefit, but through the conservatism of its officers other benefits were chosen instead. In 1908 the executive board was authorized by the convention to ascertain the probable cost of the benefit, but the finances of the union were in such condition that the adoption of the benefit at that time would have been impossible.²⁶ In the Pattern Makers this benefit was considered at the organization of the union, and has since been discussed at nearly every convention. As several of its local unions already had unemployment benefits, the movement made considerable headway, but each time the question has been submitted to the members, it has failed of adoption. During the financial panic of 1896 and the years of depression following there was a strong movement in favor of the out-of-work benefit in the Iron, Steel and Tin Workers, Painters, Granite Cutters, Bakers, and Lithographers, but in recent years there appears to have

²³ Barnett, *The Printers*, p. 103.

²⁴ *Ibid.*, p. 106.

²⁵ *Proceedings*, 1915, p. 65.

²⁶ *Proceedings*, 1908, p. 93.

been no attempt in these unions to reopen the question. On the other hand, in the Brewery Workers, Metal Polishers, Photo-Engravers, Boot and Shoe Workers, and Potters, the out-of-work benefit has been the subject of consideration during the past few years, and at each succeeding convention seems to gain additional support.

The failure of the national unions to provide out-of-work benefits has led many local unions in various trades to establish systems of their own. These exist in nearly all unions and some of them have been in existence for many years. Probably the oldest and most important are those found among the Printers.

The Typographical Association of New York City, as early as 1831, provided that the sum of \$3.00 per week should be paid to unemployed single members and \$4.00 per week to unemployed married members. This benefit was to be paid as long as the members were unemployed unless a member refused to accept a situation offered him or made no effort to procure employment. This system remained in operation for only a few years, but it was re-established later and was maintained throughout a business depression.²⁷ In September, 1893, the unemployed benefit was reestablished, but it was not until March, 1896, that a permanent system was founded. The money for this benefit was to be secured by an assessment of one per cent on the earnings of those employed. Unemployed members who had been in good standing for one year were entitled to a benefit of \$4.00 per week for the first four weeks of unemployment, but not more than four weeks' benefit could be drawn in any six weeks nor more than \$60.00 in any one year.²⁸ This system remained in operation until August, 1907, during which time the sum of \$520,645 was expended. The following table shows the annual total cost and the annual average per capita cost.

²⁷ George A. Stevens, "The History of Typographical Union Number Six" in Annual Report of the New York Bureau of Labor Statistics, 1911, part 1, pp. 112 and 113.

²⁸ Ibid., pp. 478 and 479.

COST OF MAINTAINING THE OUT-OF-WORK BENEFIT IN THE NEW YORK CITY TYPOGRAPHICAL UNION

Year	Total Cost	Per Capita Cost	Year	Total Cost	Per Capita Cost
1894	\$18,259.04	\$3.59	1902	\$40,715.75	\$7.07
1895	17,779.05	3.81	1903	44,510.86	7.14
1896	25,365.20	5.38	1904	45,458.12	7.06
1897	30,211.70	6.29	1905	50,385.80	7.40
1898	35,169.24	6.90	1906	54,701.69	8.11
1899	37,274.13	6.88	1907	40,039.56	5.95
1900	40,323.65	7.45	Total . . .	\$520,645.25	
1901	40,451.46	7.36	Average . .	\$37,188.90	\$6.45

It will be noticed that the per capita cost shows no sudden changes in periods of depression or prosperity. With but few exceptions, the cost increased each year—from \$3.59 in 1894 to \$8.11 in 1906. Inasmuch as the weekly benefit and the maximum amount which could be drawn in one year remained the same it is evident that the benefit, if continued, would have become a serious financial drain upon the union's resources. Since August, 1907, when the system was abolished, the unemployed who have been in need of assistance have been given benefits, ranging from \$5.00 to \$15.00 according to individual need, through a benefit board which investigates each case to prevent imposition. The money for this relief has been secured by a special assessment of one half of one per cent on the earnings of those employed. During the depression of 1914 this source of income was insufficient and an assessment of five per cent on all earnings of over \$10.00 per week was made.²⁹ Several other local unions of the Printers, especially the Chicago union, have been paying out-of-work benefits for several years.³⁰

Notwithstanding the fact that their national union pays unemployment benefits the three hundred German typesetters of the New York City local union have established an additional benefit. This is so arranged that after a member has received the national benefit for four weeks

²⁹ The Survey, February 20, 1915, p. 550.

³⁰ Typographical Journal, January, 1915, p. 42.

the local union provides a benefit for the succeeding weeks, during which the unemployed member receives no benefit from the national union.³¹

The Boot and Shoe Workers³² and the Lithographers³³ have constitutional provisions recommending that their local unions establish out-of-work benefit funds. In both unions several of the subordinate unions have acted upon the suggestion. The New York City branch of the Lithographers, for instance, provides that members who have been unemployed for one week are entitled to a benefit of \$3.00 per week. The maximum amount that can be secured in one year is \$60. To be entitled to the benefit, a member must secure from the delegate of the shop in which he was last employed a certificate stating the cause of his discharge or lay-off. If he is instructed by a local union officer to apply for a position and fails to do so, he is not entitled to any benefit.³⁴

The Bakery and Confectionery Workers at its convention in 1904 recommended that "immediate steps be taken to create in every local union an out-of-work benefit."³⁵ In 1915 Secretary Iffland stated that about thirty or forty local unions had inaugurated systems for the support of their unemployed.³⁶ In the Brewery Workers there are probably not less than twenty local unions which pay out-of-work benefits, but as no report of these funds is made to the national union, detailed information cannot be secured concerning them.³⁷ The Newark, New Jersey, local union, with 370 members, reported to the convention of 1903 that it had expended \$10,000 during the previous year for the support of its unemployed,³⁸ and the Chicago local union of 650 members reported that in 1900 it had disbursed \$3,652

³¹ The Survey, February 20, 1915, p. 549.

³² Constitution, 1913, sec. 64.

³³ Constitution, 1913, art. 4, sec. 5.

³⁴ Constitution, 1905, art. 3, secs. 2, 3, 4 and 5.

³⁵ Bakers' Journal, October 21, 1905, p. 1.

³⁶ Interview, August, 1915.

³⁷ Interview with Secretary Proebstle, August, 1915.

³⁸ Proceedings, 1903, p. 193.

on account of its unemployment benefit.³⁹ The Cleveland branch provides that a member who has been out of employment for four weeks is entitled to a benefit of \$3.00 per week for ten weeks during a year,⁴⁰ and the New York City local union with 1200 members pays a benefit of \$4.00 per week for twelve weeks in each of two years, after which a member must pay dues for a full year before he will again be entitled to the benefit.⁴¹

Several of the larger local unions of the Pattern Makers have had out-of-work benefit systems in operation for the past ten years. The Boston association established its benefit in 1906. It was provided that a member who had been in good standing for at least six months should be entitled to a benefit of \$7.00 per week, such benefit to begin after the first week of unemployment and to be limited to thirteen weeks in any one year.⁴² During the period April, 1913, to April, 1914, \$4,280 was expended for this benefit.⁴³ The New York City local union has paid the sum of \$5.00 per week as relief to its unemployed members for several years. During the year 1908 this benefit cost the union an average of \$728 each week.⁴⁴

Among the Photo-Engravers, the local unions in Philadelphia, New York, Chicago, and several other cities have successful out-of-work funds. The New York local union pays to the unemployed a weekly benefit of \$6.00 for an indefinite period.⁴⁵

In the following unions there exist but one or two local-union permanent out-of-work benefits: Boilermakers, Blacksmiths, Bookbinders, Cloth Hat and Cap Makers. Commercial Telegraphers, Glass Workers, Hotel and Restaurant Employees, Lace Operatives, Ladies' Garment Workers, Spinners, and Wood Carvers. In the building trades very few local unions maintain out-of-work funds.

³⁹ Proceedings, 1901, p. 92.

⁴⁰ Proceedings, 1901, p. 91.

⁴¹ The Survey, February 20, 1915, p. 550.

⁴² Pattern Makers' Journal, April, 1906, p. 13.

⁴³ Ibid., May, 1914, p. 20.

⁴⁴ Ibid., May, 1908, p. 3.

⁴⁵ The Survey, February 20, 1915, p. 550.

An indirect form of unemployment benefit is the exemption of those who are out of work from the payment of dues and assessments. This rule is found in the Blacksmiths, Boilermakers, Brewery Workers, Cigar Makers, Diamond Workers, Glass Workers, Granite Cutters, Hatters, Iron Molders, Leather Workers on Horse Goods, Lithographers, Locomotive Firemen, Machinists, Metal Polishers, United Mine Workers, Pattern Makers, Photo-Engravers, Piano and Organ Workers, Pulp, Sulphite and Paper Mill Operatives, Stove Mounters, and Western Federation of Miners. In other unions, such as the Flint Glass Workers and Printers, where the members are taxed in proportion to the amount of their wages, the unemployed are automatically freed from the payment of dues.

The dues of those unions which have developed strong beneficiary systems have naturally increased with the introduction of each new benefit, and in some cases amount to five per cent of the members' wages. The unemployed member thus finds it difficult at times to remain in good standing. Moreover, in some cases those who have been in arrears for a certain number of weeks are excluded from union benefits. On account of these circumstances about twenty national unions exempt the unemployed from payment of dues so that they can be retained as members and be entitled to the various benefits.

The general character of these provisions is much the same. The Iron Molders exempt unemployed members from payment of dues for a period of not exceeding thirteen weeks in any one year. Those who have paid dues for the preceding six months are entitled to this exemption.⁴⁶ This rule was adopted in October, 1897, and to the first of January, 1915, the cost of the system was \$316,168.⁴⁷

The United Mine Workers, on account of seasonal unemployment in the trade, exempt members from the payment of dues when unemployed. A member who has been idle

⁴⁶ Constitution, 1912, art. 18, sec. 1.

⁴⁷ Molders' Journal, February, 1915, p. 112.

for one month is excused from payment of all dues until he again obtains employment.⁴⁸ The Granite Cutters provide that any member in good standing who is unemployed shall be exempted from one-half of the regular dues.⁴⁹ The Metal Polishers excuse members who are unemployed from the payment of dues for three months after four weeks of idleness.⁵⁰

In view of the fact that the out-of-work benefit is one of the devices by which trade unions protect the standard rate and the working conditions by relieving members of the necessity of accepting less favorable terms and conditions, it is difficult to understand why the out-of-work benefit is not more widely used. In the greater number of unions the officers are staunch advocates of the system, and there is no more ardent supporter of out-of-work benefits than President Gompers of the American Federation of Labor. At the New York convention of the American Federation of Labor in 1898, the delegates went on record as endorsing the payment of the benefit and urged all affiliated unions to establish such a system.⁵¹

Two reasons can be stated for the slight development of the out-of-work benefit in American trade unions; first, the unwillingness of the average union member to acquiesce in the necessary increase of dues; and second, the apparent inadequacy of the administrative agencies of the union to secure a just distribution of the benefit.

The first of these hindrances to the establishment of the out-of-work benefit needs little comment. The average workingman joins a trade union chiefly from the desire to carry a union card and participate in the better conditions secured by the union. The matter of benefits, and especially out-of-work benefits, is of secondary importance. He wants to be a member of the union, but he also wants the dues to be as small as possible.

⁴⁸ Constitution, 1914, art. 14, sec. 23.

⁴⁹ Constitution, 1912, sec. 134.

⁵⁰ Constitution, 1913, art. 17, sec. 3.

⁵¹ Proceedings, 1899, p. 5677.

The second hindrance grows chiefly out of the personal acquaintance of the local union officials with the members. The experience of the Cigar Makers, and for that matter, the history of any trade union benefit, shows that there are always local union officials who pay benefits which should not have been paid. The disbursing agencies must be given considerable discretion in determining whether or not the applicants are entitled to the benefit. Further, the local officials seem unable to deal strictly with a member who abandons a job on plausible grounds. The experience of the New York local union of the Typographical Union with an out-of-work benefit may be cited. A member of that organization writes: "We found that a number of men each year drew the full amount that was permitted them under the laws regulating the fund, and that these men could best be described as 'panhandlers.' The abuses in our case eventually became so flagrant that the fund was abolished upon the report of an investigating committee to the effect that the majority of the beneficiaries of the fund belonged to this dissolute class."⁵² The unions have specifically set forth in the rules on the subject the manner in which the benefit systems are to be administered and the various conditions under which the unemployed members shall become entitled to the benefit. The systems generally have been well planned but poorly administered.

Since the establishment by Great Britain of a comprehensive insurance plan some of the American trade union officials have inaugurated campaigns for the adoption of a similar scheme by this government.⁵³ Inasmuch as the consensus of opinion among recent writers on the subject is in favor of utilizing the trade union in a scheme of government insurance,⁵⁴ it is not surprising that American repre-

⁵² A. J. Portenar, *Problems of Organized Labor*, p. 73.

⁵³ The text of the British Insurance Act is contained in Bulletin of the United States Bureau of Labor, No. 102.

⁵⁴ I. G. Gibbon, *Unemployment Insurance*, p. 251; Cyril Jackson, *Unemployment and Trade Unions*, p. 29; Henry R. Seager, "Outline of a Program of Social Legislation," in *Proceedings of the first Annual Meeting of the American Association for Labor Legislation*, 1907, p. 87.

sentatives of organized labor demand that the trade unions should be given the right to administer the benefit among their own members.⁵⁵

We have seen that three national unions have established unemployment benefits, that a few more have provided emergency relief funds for those out of work, and that a small percentage of the local unions have regular benefits for the unemployed. Under such conditions one might expect to find the average unemployed trade unionist in as bad a predicament as the unemployed non-unionist. But such is by no means the case. There is scarcely one American local union which does not in some form or other contribute towards the support of its unemployed members when they are in need of assistance. A member out of work is rarely turned away from the union without receiving some assistance. In some cases it may take the form of a loan of a few dollars, but his union will rarely allow him to suffer from want. The usual procedure is for a friend of the unemployed to announce at a meeting of the local union that a brother member is unemployed and in need of money to pay the rent and secure the necessities of life. With scarcely any further remarks, the union votes to donate a sum of money to the member. In other cases the local union sets aside a certain sum of money for the relief of the unemployed, and appoints a committee which has complete control over the granting of aid.

Frequently the unions, in periods of general business depression, maintain relief agencies for their unemployed. In 1915 some two hundred Jewish trade unions of New York City opened headquarters on the lower East Side and gave out groceries to their unemployed members.⁵⁶ From January 1 to May 1 of the same year, the bricklayers' local union of Toronto, Ontario, donated 372 baskets of groceries and

⁵⁵ G. W. Perkins, in *American Labor Legislation Review*, June, 1913, p. 236; T. J. Dolan, in the *Steam Shovel and Dredge Man*, April, 1915, p. 380; *Proceedings of the Massachusetts Federation of Labor*, 1915.

⁵⁶ *The American Labor Legislation Review*, November, 1915, p. 104.

many tons of coal to their unemployed members.⁵⁷ Of course, these relief agencies are marked with the stigma of charity and consequently only those who are in dire need apply to them. The system is far from ideal. The unemployed are assisted only when they are in great need, and those who have been fortunate and wise enough to save for the days of unemployment do not receive any aid from the system. But, as one trade unionist said, "It is better than that provided for the non-unionist."

The effectiveness of even so crude a system is shown by the fact that union members are rarely found among the applicants to organized charities. Those associated with charity organizations adequately appreciate the valuable social services performed by the trade unions. A writer on the subject says, "Charity workers testify to the fact that during business depressions when the unemployed must be cared for by the thousands, scarcely a single member of a trade union has applied for relief either to the cities or to philanthropic organizations."⁵⁸ The Secretary of the United Charities of St. Paul, Minnesota, stated that in 1914-1915 "The trade unions with their benefit features have been the saving grace in the situation here."⁵⁹ In December, 1913, the city of Seattle, Washington, provided special work for the unemployed, and of the 1300 men who applied for work only six were members of trade unions.⁶⁰ The chairman of the relief work in Chicago during the severe season of 1893-1894 reported that not a single member of a trade union in that city applied for aid either to the city or to the philanthropic organizations.⁶¹

As further proof of this fact, the report of the Commission of Industrial Relations may be quoted: "It is

⁵⁷ The Bricklayer, Mason and Plasterer, May, 1915, p. 104.

⁵⁸ Adna F. Weber, quoted in the Bricklayer and Mason, January, 1902, p. 7.

⁵⁹ Quoted in the American Labor Legislation Review, November, 1915, p. 589.

⁶⁰ Associated Press Dispatch.

⁶¹ Bulletin of the United States Department of Labor, Number 22, May, 1899, p. 400.

significant that trade union members are practically never found among the applicants for charity during periods of unemployment. They may be unemployed, but they are in some way cared for, either by having work found for them, or by systematic or voluntary relief."⁶² With but few exceptions, those applying to charitable organizations as union members are found to be expelled members or in arrears with their dues.⁶³

⁶² Final Report of the Commission on Industrial Relations, 1915, p. 175.

⁶³ Mr. C. C. Rohr, a member of the Economic Seminary of Johns Hopkins University, in 1911-1912 made an investigation of 500 cases of the Federated Charities of Baltimore City. The Charity records showed that of the 500 applicants 19 were members of trade unions. Upon investigation, however, nine of these were found never to have been associated with any union. And of the remaining ten only two were union members in good standing at the time when the period of unemployment began. One of these was unable to live upon the strike benefits of his union, and the other was a member of a local union on strike which had expended its entire strike fund.

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BY

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First Lieutenant, Judge Advocate, A. E. F.

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PREFACE

This monograph needs little preface. The method of study is local and intensive, but I have endeavored to draw some general conclusions from the specific subject-matter treated. The book, as its title implies, is neither a text book nor a reference book, though it may serve to a slight degree in the latter capacity, but a dissertation.

I take this means of expressing my gratitude to Prof. W. W. Willoughby, who served as my inspiration and rendered me much assistance in the preparation of this monograph, and also to Prof. George E. Barnett and to Miss Anna Herkner, former Assistant-Chief of the Maryland Bureau of Statistics. Various others to whom I am indebted are mentioned throughout the text.

The monograph was completed towards the end of 1916 and, because of the author's participation in the war, it has been impossible to bring it up to date in many particulars.

M. H. L.

THE LABOR LAW OF MARYLAND

CHAPTER I

INTRODUCTION

The Problem of the Labor Law.—The labor law of a state is a peculiar combination of unwritten and statute law. It differs from most law in that it is not merely an evolution of the customary law of a community, but is a definite attempt by the community to solve, now by the common law, now by statute, an acute social problem. It does to a degree reflect the customary morality of the community, but this not unconsciously, as, for example, in the case of commercial law, but as a conscious adoption of an ethical principle for a political norm. A complete understanding of labor law requires, therefore, not merely a delving into jurisprudence, but also into political theory. We must study, not merely the law itself, but the law as an expression of the relation of the state to its citizens; the labor law in truth is one of the most interesting media in which to study the extent to which the state can justify its interference in the private life of individuals. Accordingly, although this study will be primarily a critical analysis and description of actual laws in practical operation, there will necessarily be in it an undercurrent of speculative political theory.

The state, then, in its labor law sets out to solve a very definite social problem, the problem of industrial unrest, the problem of reconciling and placating labor and capital. The history of this activity of the state stretches back six or seven centuries, and the policy of the state has varied from complete aloofness to intimate intervention.

Logically and perhaps historically the first instrumentality made use of by the state in meeting the labor problem is the common law. This results, not from an active intent on the part of the state to solve any problem, but from a quiescent attitude towards an unimportant phenomenon. The common law is turned to before the labor problem assumes any special characteristics of its own, and the various cases are settled according to the general principles of the common law as laid down in cases between individuals who are in no special relation to each other. If, in the beginning, as is usually the case, no economic question obtrudes into the case, but the matter is one of pure law, the decision based on former precedents will work substantial justice. When, on the other hand, the relative economic position of the two parties is of importance, decisions based on pure law will not be adequate and will often entirely fail to settle the question at bar. When, as always happens, the economic status of the parties does not merit attention until after the deciding of cases involving similar matters, but not calling into question the economic relation, it is practically impossible for the judges when the economic question is presented to them to disregard the precedents and to dispense economic justice and not justice according to law. Common law does, as is often said, progress and grow with the times, but more often legislation is necessary to make it entirely adequate. Thus the common law of negligence did not meet the requirements of industrial accidents, and employers' liability and compensation laws were the result. Thus the common law of individual bargaining and competition does not seem to meet the requirements of collective bargaining, and legislation recognizing the validity of unionism is being demanded.

A more serious inadequacy of the common law, however, as a means of solving the labor problem arises from the inherent characteristic of that law as a system of jurisprudence. The common law is remedial, compensatory; labor conditions call for regulation, prohibition. The com-

mon law seeks to relieve the sting of a wrong after it has been committed; labor conditions necessitate regulations making impossible the commission of the wrong. A close scrutiny of the entire field of the common law will reveal no principles which could support such movements as the "safety first" and "living wage" propagandas. Even equity with its canons of preventive relief against irreparable injuries does not furnish a proper foundation for the state control of labor conditions. Thus, though the state could and does depend to a great degree upon its unwritten law in solving the economic problem of labor and capital, it must and does every day more and more seek the answer in social legislation.

But the first manifestations of state activity in the field of labor legislation were of an entirely different nature from what is now usually referred to as social legislation. These laws, of which the Statute of Laborers, passed after the Black Death, with its later variations and the Elizabethan Statute of Apprentices are the classical examples, were not based upon any economic principle of the welfare of the laborer, but, in so far as any general principle of economics was involved, upon a desire to keep low the cost of commodities. Rather, it may be said, these laws were secured by the dominant legislative class, the monied class, for its own immediate benefit. In this sense these laws, like most labor laws, were class legislation and nothing else. But there did develop under the name of mercantilism, of which these two laws were precursors, a theory of state activity which entirely neglected the interests of the workman. Under this system the paternalistic state in its endeavor to develop itself through its commerce subordinated the laborer to the merchant and subjected him to minute control in many of the terms of his employment. It is, of course, true that the workingman whom this legislation affected had just emerged from the status of serfdom and was a new and disturbing factor in the industrial life of the time. But so thorough was this repressive legis-

lation that the new, free laborer was hardly in a better position than the former villein.

It was against this system that Adam Smith and Jeremy Bentham wrote; and as a result of their preachings there ensued the period of *laissez-faire* in the relation of the state to labor. At the climax of this individualistic philosophy the state retired almost completely from the regulation of economic affairs. Competition was relied upon to work the salvation of society. The individual laborer was made perfectly free to bargain for his own terms and to secure his own economic betterment. The state progressed through the progress of its individual citizens.

The period of *laissez-faire* marked a real and substantial advance for the workingman, but it was short-lived. It was not any inherent fallacies in the theory which caused its modification—the philosophy of individualism has never been abandoned—but rather a change in the actual conditions to which the theory had to be applied. Contemporaneously with the growth of *laissez-faire* individualism occurred that stupendous advance in industrialism which is usually termed the Industrial Revolution. With the invention of steam-driven machines and modern means of transportation the factory system of manufacture speedily took the place of the small shop system. A single employer began to employ hundreds and then thousands of laborers. The laborer, though legally and theoretically free to bargain with the employer for the terms of his employment, found himself practically at such a disadvantage that the employer could hire him almost on his own terms. The labor union was the workingman's answer to the factory system, but it has not yet proved adequate in itself. The state has, therefore, stepped in to guarantee to the laborer certain terms and conditions of employment which have been conceived to be reasonable and necessary.

This is the present-day status of labor legislation. The doctrine of *laissez-faire* survives in so far as the state leaves to the common law and individual action all that

these instrumentalities are capable of handling. *Laissez-faire* is abandoned in so far as the state, recognizing the inequality of the bargaining power of employer and employee, regulates as seems best for the welfare of the state certain of the terms of the bargain. The state sacrifices theoretical individual liberty for what is considered a truer means of self-development. The state in its endeavor to offset this inequality of bargaining power has returned to some of the functions of the medieval paternalistic state; but those who wish to make the distinction between the former antagonistic and the present sympathetic attitude of the state to labor sometimes term the present state maternalistic rather than paternalistic in its regulations. To a certain degree this distinction is specious and more will be said of it in the final chapter of this study. It is sufficient to say here that the solution which has been attained in practical legislation is hardly a final remedy.

In the United States there is, besides political theorizing upon the relation of the state to labor, another fundamental to be considered. Our written constitutions enforced by powerful courts impose a legal limitation upon state activity as well as a philosophical limitation. While the state is quiescent the constitution is unobtrusive; but when the state functions in enacting laws the constitution exercises a tremendous restraint upon state action. The whole of state activity in the United States affecting the labor problem has been manifested within the last of the periods just discussed, that of *laissez-faire* ameliorated in favor of the laborer. All of this social legislation comes in conflict with the "equal protection of the laws" and the "due process of law" clauses of the Fourteenth Amendment of the federal constitution or similar provisions of the state constitutions. Both require brief discussion.

The essentials of "equal protection of the laws" are easily stated. Every citizen of a state is entitled to equal treatment by the laws of that jurisdiction and to all the privileges extended to any other citizen by the law. Reasonable

classification, however, is permissible if exercised on administrative or any other justifiable grounds. Legislative classifications are *prima facie* reasonable.

The "due process of law" clause is not so easily explained. Historically it is traced back to the *per legem terrae* provision of Magna Charta, but as a substantive provision of law its development is recent. Strictly conceived this clause might have been construed as making perpetual the eighteenth century doctrines of *laissez-faire* and natural rights, and as limiting state activity to the narrowest bounds. The clause luckily never received so narrowing an interpretation, but was merely construed as allowing the courts to inquire whether property appropriated by legislation was taken for a legitimate state purpose. Early in their interpretation of this clause, especially with reference to social legislation, the courts evolved the police power of the state as an exception to the prohibition and through this exception the effect of the prohibition has been much curtailed. It is indeed more profitable to consider the cases dealing with labor legislation under the Fourteenth Amendment as limiting the extent of the police power than as defining due process of law, for the exercise of the police power is due process of law.

Thus viewed, the explanation becomes more simple. It is still impossible to define and limit exactly the police power, but it is now possible to give rather succinctly the two extreme views to one of which most decisions adhere. There is, on the one hand, the strict legalistic view that the police power extends only to the protection of the health, safety and morals of the community; that the state activity should be strictly defined; that none but the most moderate of social legislation should be enacted. The Maryland Court of Appeals leans to this view, although it is not entirely constant in its principles. The other view is that the police power extends also to the furtherance of public convenience. As put by Justice Holmes, "it may be said in a general way that the police power extends to all the great

public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."¹ This is the view held by the Supreme Court and appears to exercise practically no restraint on really seriously considered legislation.²

Having these fundamentals in view, even as so inadequately outlined in this chapter, the object and plan of this study may be made clear. The primary purpose has been to describe and analyze all of the law of Maryland in any way concerning labor. In order better to understand the law of Maryland, I have usually brought it into contrast or comparison with some conceived ideal borrowed sometimes from purely theoretical sources, but more often from the law of other communities, generally of other States of the Union such as Massachusetts, New York and Wisconsin, but when necessary going to England and Continental Europe for suggestions. In fulfilling this primary purpose there must usually be some incidental consideration of the manner in which Maryland has met the problems which have just been outlined. This discussion of political theory will be kept strictly in the background until the last chapter, which will endeavor to lay down some constructive principles. The plan of the work has been to follow as closely as possible the logical development of state activity. No space has been allotted to the consideration of the law of the labor contract, since this law is merely an adaptation of ordinary contract law and contains no distinctive features. The study begins with the law of the labor union, which has been almost entirely left to the common law. Then follows a consideration of the law of workmen's compensation, which marks the only complete abandonment of any principles of the common law referring to labor. The three succeeding chapters deal with the new social legis-

¹ *Noble State Bank v. Haskell*, 219 U. S. 104.

² For a statement of the author's sympathy with this view, see his article, "Imminent Constitutional Shams," in the *Forum*, vol. 57, Jan. 1917, pp. 91-98.

lation, demonstrating how far the laissez-faire theory has been abandoned; and the study ends with chapters on the administrative system and the relation of the state to labor. But before taking up the law itself it is necessary to set forth some uninteresting, but necessary, facts about Maryland.

Maryland Conditions.—As far as labor law is concerned Maryland will be found to be, if not a typical American State—for no State is typical when legislation is in question—at least a mean or average State. Its law displays none of the extremist characteristics of the experimentally inclined Western and Middle Western States, nor does it lag with the Southern States in the wake of social legislation. It follows rather closely on the heels of New York and more remotely after the more radical Massachusetts. Considering its geographical position Maryland, with its somewhat backward labor law, may be judged rather leniently.

The State is usually classed as one of the Southern States. Though the northernmost of these States and outside of the Confederacy in the Civil War, it was a slave State and had all the traditions of the aristocratic, non-industrial South. Moreover its southern neighbors, Virginia and West Virginia, have the typical Southern labor law, perhaps sufficient for their needs, but by no means effective. On the other hand, Maryland has come to be in the class of industrial States and, in this respect, her competitors lie to the north rather than to the south. But, here also, the State is restrained rather than spurred on by its neighbors. Pennsylvania, which borders the whole northern boundary, has until recently been most delinquent in its labor law and many of the odious half measures in the Maryland law have been caused by the potential competition of Pennsylvania's industries. These excuses for the inferiority of the Maryland law call up an explanation of another cause of Maryland's backwardness. Like most Southern States, Maryland's party politics are at a low ebb. The State does not seem to have mastered the art of clean politics and

it is dominated much more than is desirable by mediocre politicians. Although this condition does not perhaps account for many statutory shortcomings, its effect is evident in the administration of the law.

Aside from these external facts, there are other practical difficulties which must be mastered in solving by legislation the labor problem. The population of Maryland in 1910 was 1,295,346, about evenly divided between urban and rural. Of the urban population, however, 558,485 people are collected in Baltimore City, which is the only city of any size in the State. There are besides Baltimore three other cities of between ten and twenty-five thousand population and eleven other towns which are classified as urban. Baltimore is, therefore, practically the only large industrial center in the State and in it alone are found many of the social problems which are usually the occasion of legislation. Maryland, furthermore, is divided into two unequal parts by the Chesapeake Bay. The Eastern Shore, with a population of 200,161, is almost entirely rural and the only industry of any importance is canning, which for political as well as administrative reasons is almost unregulated. The Western Shore may again be divided into two sections, the Western Shore proper and Western Maryland. In the first of these is Baltimore, which practically dominates the industrial life of the section. Western Maryland lies in the Appalachians and centers around Cumberland, the second largest city in the State. Its chief industries are coal-mining and transportation. Western Maryland is a narrow strip of country, and it is chiefly here that the low standards of the Pennsylvania and West Virginia labor laws have to be guarded against. Geographical and economic sectionalism accounts for the great amount of local legislation on the Maryland statute books and to some extent for the lack of coordination in the administrative system.

In 1910 there were employed in gainful occupations a

total of 541,164 persons, of whom 410,884 were male and 130,280 were female, comprising, respectively, 81 per cent and 25 per cent of the total population of each sex above the age of ten years. Their occupational distribution was as follows:

Occupation	Number	Per Cent
Agriculture	171,100	21.6
Manufacture	172,155	31.8
Domestic and personal service	78,820	14.6
Trade	61,646	11.4
Transportation	42,776	7.9
Clerical	28,871	5.3
Professional	23,474	4.3
Public service	8,954	1.7
Mining	7,368	1.4

CHAPTER II

THE LABOR UNION

The Law of Union Activities.—Historically the law of labor union activities was the first evolved by the state; evolved, not enacted, for most of it is judge-made law. Logically considered, also, the law of union activities must be accorded first place; for, granted that the labor union receives favorable treatment from the state, it seems easy to demonstrate that hardly any other state activity is necessary.

The Maryland labor law of the present day is based on and grew from the early English law, and hence some slight treatment of that law is necessary. The beginnings of the English law, however, are somewhat surrounded in mystery. It seems that the earliest activities of the union were branded as criminal conspiracy at the common law, though it is by no means certain that the offense of criminal conspiracy was not the creation of a statute. Be this as it may, before labor unions as such came into prominence statutes were passed early in the eighteenth century forbidding combinations of laborers for the raising of wages and other purposes and making such combinations criminal conspiracies. These statutes grew in severity and comprehensiveness until the beginning of the nineteenth century. Thereafter the law became more liberal. The cause of this change was the union itself. Utterly unsanctioned and potentially oppressed in its most beneficial activities by the law, it nevertheless continued to exist. It was not a casual phenomenon: it was an economic growth, necessary to and justified by industrial conditions. Slowly and often surreptitiously it grew, but grow it did until, in the atmosphere of greater political liberty, it made itself felt in legislative halls. In

1875 the ban of criminal conspiracy was lifted and finally, in 1906, the union was granted a most enviable place in English law.¹

Maryland in 1776 adopted, with the other twelve States, the English law of union activities in so far as it was consonant with American ideas and ideals. This law was the harsh, antagonistic law of the eighteenth century hardly modified at all in the adoption. Thus, in an early case, the Maryland Court of Appeals sums up the law of criminal conspiracy: "An indictment will lie at common law—(1) for a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only; (2) for a conspiracy to do an act neither illegal nor immoral in an individual, but to effect a purpose which has a tendency to prejudice the public—for a conspiracy (by two or more) to raise their wages, either of whom might legally have done so; (3) for a conspiracy to extort money from another, or to injure his reputation by means not indictable if practised by an individual, as by verbal defamation; (4) for a conspiracy to cheat and defraud a third person, accomplished by means of an act which would not in law amount to an indictable cheat if effected by an individual; (5) for a malicious conspiracy to impoverish or ruin a third person in his trade or profession; (6) for a conspiracy to defraud a third person by means of an act not per se unlawful and though no person be thereby injured; (7) for a bare conspiracy to cheat or defraud a third person, though the means of effecting it should not be determined on at the time."² It is obvious that, either under the third clause declaring indictable a conspiracy to raise wages or under the fifth referring to a conspiracy "to impoverish or ruin a third person in his trade or profession," a labor union would almost surely have found itself running counter to the law. In fact, if the union were merely formed for one

¹ For a complete discussion of the early law of conspiracy as applied to labor unions, see J. W. Bryan, *English Law of Conspiracy*.

² *State v. Buchanan*, 5 H. & J. 317 (1821).

of these purposes—and it must be remembered that these prohibitions against conspiracy referred to the indirect effects as well as to the direct purposes of the union—it would be absolutely barred; for, in the same case, the court declared: “A conspiracy is a substantive offence and punishable at common law, though nothing be done in execution of it.” It seems, indeed, that this decision was entirely efficient, for no cases concerning trade unions came before the Appeal Court under this decision. But it must not be imagined that merely because no cases against unions came before the court there were no unions. The decision was efficient and complete, but hardly effective. As in England, trade unions seem to have flourished even under the shadow of the law and to have carried on trade disputes, perhaps not legally, but extra-legally.

It was probably because of the growing strength of the unions, especially as political institutions, that the legislature of 1884 was compelled to recognize their existence. In that year two bills were enacted legalizing labor unions. The first declared that an act of a combination formed in “furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy, if such act committed by one person would not be punishable as an offense (nothing in this section shall affect the law relating to riot, unlawful assembly, breach of peace, or any offense against any person or against property).”³ The second was an addition to the incorporation acts, permitting the incorporation of trade unions “to promote the well-being of their every day life, and for mutual assistance in securing the most favorable conditions for the labor of their members.”⁴ In this year, then, we can say, the labor union entered the realm of law in Maryland. In this year, also, the law concerning unionism took a different turn. Prior to this the unions had been subject to the law of

³ Laws 1884, Ch. 266; Code 1914, Art. 27, Sec. 40.

⁴ Laws 1884, Ch. 267; Code 1904, Art. 23, Sec. 41. Incorporation since 1908 takes place under the general law of incorporation, Laws 1908, Ch. 240, Secs. 2-5; Code 1911, Art. 23, Secs. 2-5.

criminal conspiracy; after these acts the employers were able to combat the unions in court merely by civil suits or injunctions. Prior to this year, moreover, no cases involving unionism came before the Court of Appeals, so that the Maryland law, in contradistinction to the English law, has practically nothing to do with criminal conspiracy.

The salient principle in the Maryland law of labor unions—and indeed in all American law on this subject—is the right of the individual to his own property and, what is practically identical in law, the right to freedom of contract. There has also been evolved another right, sometimes considered a property right, the right to carry on one's business or to work at one's trade free from outside interference. This right is indeed a recent creation of the courts, and, to a certain degree, an unfortunate creation. It is broader than the right of personal freedom and was, therefore, useful in ruling against some of the first harsh, but elusive, activities of the union; but there are two sides to this right and the unions soon came to assert it on their side. There are in every conflict between union and employer two conflicting rights. A strike is called for an increase in wages or for shorter hours, what the employees conceive to be their rights; the employer forthwith asserts that his freedom of contract is being abridged. A labor union stipulates that its men shall work only in a "closed shop," and the discharged non-union man sues for a violation of his right to work as he will. To generalize briefly in advance, we shall find in considering strikes, boycotts, closed shops—in short, all of the means by which a union makes its demands effective—that "honest effort to better the conditions of employment by the members of a labor union is lawful,"⁸ though it may incidentally interfere with the right of an individual to work on such terms as he may see fit. If, however, the aim of the union is wilful interference with the individual, though the union may thereby be indirectly benefited, the union is operating contrary to

⁸ *Minasian v. Osborne*, 210 Mass. 250, 96 N. E. 1036 (1912).

the law. Let us first, however, consider in some detail the law relating to the various activities of the unions.

"The right to organize and to utilize their organization by instituting a strike is an exercise of the common law right of every man to pursue his calling, whether of labor or business, as he in his judgment sees fit."⁶ A strike *per se* is not unlawful; it is the purpose⁷ or the means⁸ which renders it unlawful. "The law does not permit either employer or employee to use force, violence, threats of force or threats of violence, intimidation or coercion,"⁹ so that it may be said now and for all that force is unlawful; and, for the sake of brevity, the consideration of violence may be dismissed from the following discussion.

The leading Maryland case on labor organizations is the case of *My Maryland Lodge v. Adt*,¹⁰ and it will be best to quote first from that part of the decision relating to strikes. "Employees have a perfect right," says the court, "both as individuals and in combination, to fix a price upon their labor, and to refuse to work unless that price is obtained. They may organize to improve their condition and to secure better wages. They may even use persuasion to have others join their organization. They have an unquestionable right to present their cause to the public in newspapers or circulars in a peaceable way, but with no attempt at coercion. If ruin to the employer results from their peaceable assertion of these rights, it is a damage without remedy." Laborers, therefore, may strike for an increase of wages, for shorter hours, for better working conditions, for specified methods of employment or of pay.¹¹ They

⁶ Martin, *Modern Law of Labor Unions*, p. 36.

⁷ *Reynolds v. Davis*, 198 Mass. 294, 84 N. E. 457.

⁸ *My Maryland Lodge v. Adt*, 100 Md. 283, 68 L. R. A. 152.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ It has even been held in a federal court (*Delaware, L. & W. R. R. Co. vs. Switchmen's Union*, 158 Fed. 541) that workmen may strike for such purposes even though it be in violation of their service contract. What the court very probably meant was that these strikers could not be enjoined; they are clearly liable for damages.

may, it has been held, even seek the aid of their fellow workers in another establishment to join with them in a sympathetic strike if the employer is striving to circumvent the efforts of the strikers by having his work done in brother employers' shops.¹² But this case, although well considered and precise, must be confined to the exact point involved; for a sympathetic strike, like a secondary boycott, usually brings into the contest an uninterested third person who, if injured, usually has a cause of action against the union. Where there is such a community of interest as in this case, however, a sympathetic strike is not actionable. Another danger which must be avoided by the sympathetic strike as well as by all other union activities is the possibility that the union may be running counter to the contract liabilities of a third party, for "a man who induces one of two parties to a contract to break it, intending thereby to injure the other or obtain a benefit for himself, does the other an actionable wrong."¹³ This is a fundamental rule of contract law and has no special application to the law of the labor union: it is mentioned here merely because of the number of times the union has felt its force.¹⁴

The foregoing conclusions that a strike is a legal instrument of the labor union apply only when the disputes are strictly limited to the two parties concerned, the strikers and their employer; when a third party suffers injury, as was intimated in discussing the sympathetic strike, the strike stands in less favor with the courts. Unfortunately it is a rare strike which does not directly or indirectly affect some third person. The cause of this can readily be seen if we consider the problem from the point of view of the unions. The strike cannot be effective if the employer is able to fill easily the places of the strikers with non-union

¹² *Iron Moulders' Union v. Allis-Chambers Co.*, 166 Fed. 45; 20 L. R. A. (N. S.) 315.

¹³ *Gore v. Condon*, 87 Md. 368, 376.

¹⁴ A few of these cases only are here cited: *Garst v. Charles*, 187 Mass. 144; *Folsom v. Lewis*, 208 Mass. 336; *Iron Moulders' Union v. Allis-Chambers Co.*, 166 Fed. 45.

men. The unions strive to prevent this by picketing and by making the union monopolistic as to that particular class of workmen. Again, the strike will not attain the maximum efficiency if the standard which is obtained by the union is continually undermined by the cut-throat competition of non-union men in the same shop. The unions fight against this evil with the instrument of the closed shop. Again, the strike will often fail entirely if other employers or dealers trade in their normal manner with the tabooed employer. To offset this, the union has evolved the boycott, or more correctly in the technical economic phrase, the secondary boycott. But, before considering any of these more advanced forms of union activity, it will be first necessary to consider one more form of strike, a rather more advanced and more involved form of this particular activity which might be called a cross between the strike and the closed shop. It is a strike, not to procure an immediate advantage, as, for example, a raise of wages, but to strengthen the union by dictating to the employer certain terms of employment for all men in his shop. A Maryland case will illustrate.

In *Lucke v. Clothing Cutters' Assembly*¹⁵ the appellant, a non-union man, had had permanent employment terminable at will with the New York Clothing House. He was objected to by the appellee, who notified the clothing house that they objected to working with non-union men. Lucke applied for membership in the union; but, because of the lack of employment among its then members, the appellee refused him membership. Later the union sent notice to the employer that, if Lucke were not discharged, it would notify through its official organ all labor organizations of the city that "the house was a non-union one." Feeling that it was threatened with a boycott, though during the trial the union denied that this was its intention, the New York Clothing House discharged the appellant, who later

¹⁵ 77 Md. 396; 19 L. R. A. 408 (1893).

brought suit against the union for damages. The court held that Lucke was entitled to damages since the union had interfered with his right of property and freedom of contract. This interference may have indirectly benefited the union, but it wilfully and directly injured the individual in one of his fundamental rights; and the court said:

"It is not necessary that such interference [of the union with a laboring man's privilege of seeking an honest livelihood] should have been malicious in its character. . . . In this case we think the interference of the appellee was in law malicious and unquestionably wrongful . . . and, by so doing, it [the appellee] has invaded legal rights of the appellant for which an action properly lies.

"When the state granted its generous sanction to the formation of corporations of the character of the appellee (Code 1904, Art. 23, Sec. 37) it certainly did not mean that such promotion (of the well-being of their every day life and for mutual assistance in securing the most favorable conditions for the labor of their members) was to be secured by making war upon the non-union laboring man, or by any legal interference with his rights and privileges. The powers with which this class of corporations are clothed are of a peculiar character, and should be used with prudence, moderation and wisdom, so that labor in its organized form shall not become an instrument of wrong and injustice to those who, in the same avenue of life, and sometimes under less favorable circumstances, are striving to provide the means by which they can maintain themselves and their families."

To understand more thoroughly the significance of this case let us look at one apparently opposed to it, that of *Pickett v. Walsh*,¹⁶ in which was held legal a strike to enforce an agreement between a bricklayers' union and a contractor, by which the union agreed to work for the contractor if he would employ its members to perform some tasks

¹⁶ 192 Mass. 572; 78 N. E. 753; 6 L. R. A. (N. S.) 1067 (1907).

closely allied to, but less skilled than bricklaying. The court differentiated between these two cases on the ground that the strike in the latter case was on a matter directly concerning the two parties to it, the strikers and the employers, and that the laborers were striving directly to improve their own conditions. This distinction seems to have been generally followed,¹⁷ but in discussing this question some of the finest legal reasoning has been used. The tendency seems to be to find a community of interest among the strikers and between them and their brother unionists who are not actively engaged in the strike, but for whose benefit the strike is declared, and, on the whole, the trend seems to be towards holding legal strikes aimed at securing these competitive advantages for union laborers. The distinction, however, is still good between mediate and immediate quarrels and will certainly be used in hard cases where justice seems to demand it.¹⁸

If the tendency has been towards increasing the rights and powers of trade unions in securing the privileged employment of its own members, the absolute contrary has been true with respect to the legality of picketing. Labor unions, in fact, have suffered to a great degree because of of injunctions restraining them from posting members on the environs of the place of strike to persuade strike-breakers not to take employment in the hostile shop and to obtain information as to the employer's activities. Picketing, it is true, was far from being such a milk-and-water affair twenty-five years ago as it is now; it was in this activity, perhaps, that the trade unions showed their ugliest side and incurred the ill-will of the public. This popular estimate seems to have been reflected to a great degree in the courts, which, beginning by merely discountenancing picketing that was contrary to public order, have come to

¹⁷ E. g., *National Fireproofing Co. v. Mason Builders' Ass'n*, 169 Fed. 256, 26 L. R. A. (N. S.) 148; and *Meur v. Speer*, 32 L. R. A. (N. S.) 792 (Ark.).

¹⁸ For a fuller discussion see note in 6 L. R. A. (N. S.) 1067.

look upon almost all picketing as enjoinalable, if not absolutely criminal.

A general declaration of the law was given in the case of *My Maryland Lodge v. Adt*:¹⁹ "They (the union laborers) may even use persuasion to have others join their organization."²⁰ They have an unquestionable right to present their cause to the public in newspapers or circulars in a peaceable way. . . . But the law does not permit either employer or employee to use force, violence, threats of force or threats of violence, intimidation or coercion." The troublesome question has been, what is intimidation and coercion? Thus mere argument, where the odds were four or five to one in favor of the arguers, has been said to constitute unlawful intimidation.²¹ Peaceful picketing, which incidentally interfered with customers patronizing the picketed shop, has been enjoined.²² A fair statement of the law is contained in the following: "The very fact of establishing a picket line is evidence of an intention to annoy, embarrass and intimidate, whether physical violence is resorted to or not. There have been a few cases where it was held that picketing by a labor union is not unnecessarily unlawful if the pickets are peaceful and well behaved; but, if the watching and besetting of the workmen is carried to such a length as to constitute an annoyance to them or their employed, it becomes unlawful. . . . To picket . . . was in itself an act of intimidation and an unwarrantable interference with the employer's rights." Even if pickets are not guilty of intimidation, "the complainants are entitled to protection."²³ The Maryland law would seem to go quite as far as this Illinois case, for, in spite of the rather liberal language just quoted from the *Adt* case, the court in that

¹⁹ 100 Md. 283; 68 L. R. A. 752.

²⁰ See, however, *Hitchman Coal & Coke Co. v. Mitchell et al.*, 38 Sup. Ct. 65 (1917).

²¹ *Allis-Chambers Co. v. Iron Moulders' Union*, 150 Fed. 155.

²² *Foster v. Retail Clerks' Intern'l Protective Ass'n*, 78 N. Y. S. 860.

²³ *Barnes v. Chicago Typographical Union*, 232 Ill. 421; 14 L. R. A. (N. S.) 1018.

case upheld an injunction which practically forbade all picketing, even for purposes of information only. It would then seem that picketing has been in law practically plucked of its stings: picketing can perhaps be safely used only as a means of procuring information. This would indeed be a hard blow at unionism if it were not for the fact that an employer will not usually combat in the courts peaceful picketing unless it is used in conjunction with an unlawful strike or boycott. As a practical matter it may then be said that peaceful picketing as an adjunct of any other lawful activity of a union is not likely to lead to any action at law. If used in its really civilized form this most powerful weapon of struggling unionism may be still of avail in industrial disputes.

Thus far we have been considering the union mainly as a body of workingmen; it has another aspect, that of a body of consumers; and it is upon this quality of its membership that the union relies in the activity usually known by the name of the boycott. In its conflict with the employer the boycott is a frequent weapon of the union. In itself, as will be seen, it is not a very efficient weapon; but in conjunction with the strike, with which indeed it is generally used, it often enables the union to achieve what an unaided strike might not have attained. There are two degrees of the boycott, primary and secondary; but the courts do not seem to observe the distinction, some including the two classes under one head, others limiting the two classes at entirely different points, and a great number having reference to the second class alone when they speak of the boycott. The primary boycott is the act of a combination of individuals who agree among themselves not to patronize a certain dealer. The secondary boycott is the act of a combination which tries to economically outlaw a certain dealer by intimidating third parties, either by strike or boycott, to prevent them from patronizing this dealer. Assuming the object of the boycott to be legal, the primary boycott is gen-

erally a legal activity of the union, whereas the secondary boycott is quite as generally deemed illegal.

In Maryland we have a leading case on this subject, and it may be well to consider it specifically. The case, *My Maryland Lodge v. Adt*,²⁴ is one of secondary boycott, but the court laid down some additional law of utmost importance. Adt, upon refusing an increase in wages, had been struck against. Further, the union sent circulars to the brewers who were in the habit of contracting with Adt for machinery asking them to boycott Adt on the ground that he no longer had a union shop. Upon failure of the brewers to meet this request, the union circulated "unfair" broadsides against them; and in self defense the brewers were compelled to withdraw their patronage from Adt, whose business was thereby practically ruined. On these facts the Court of Appeals upheld an injunction against the union, and declared such methods of warfare manifestly unfair and actionable. The court in this case merely held illegal the secondary boycott; but some of its language is so loose that it may be possible to interpret it as declaring all boycotts illegal, especially as the court makes no distinction between the two classes of boycott. It is submitted, however, that if the court was referring to the primary boycott per se, its stand is hardly justified.

The distinction, indeed, between the two classes of boycott has, as was intimated, been sustained by the great weight of authority.²⁵ An individual has a right to bestow his patronage where he wishes; and the mere fact that he combines with others in carrying out his purpose does not make the act prima facie actionable. To make it illegal there must be in the object or means of the primary boycott some malicious purpose, as the injury of another without any direct benefit to those engaged in the boycott. The

²⁴ 100 Md. 238; 56 Atl. 721; 68 L. R. A. 752 (1905).

²⁵ See *American Federation of Labor v. Buck's Stove & Range Co.*, 33 App. D. C. 83; 32 L. R. A. (N. S.) 748; and note on this case in L. R. A.

primary boycott being in itself lawful, any publication in furtherance thereof, if that is the purpose of the publication and no intimidation or coercion is intended, would also be lawful;²⁶ but here again, as in the question of picketing, the courts are prone to see intimidation in any publication, with the result that the unions must be most careful in their use of legally recognized weapons. If, then, it is dangerous to publish unfair lists in primary boycotts, it is of course an absolute infringement upon the rights of another to publish such a list in pursuance of a secondary boycott.

It is needless and would be indeed useless to enter here into a detailed investigation of what has been held illegal boycott. The rule seems to be that if a third party has been drawn into the controversy between the two contending factions, then the boycott is a secondary boycott and he against whom it is being prosecuted may recover for his damages.²⁷ This, although it seems to be well-settled law, involves an inconsistency. Take, for example, the *Adt* case: employees strike for increase of wages and in pursuance of that strike for a perfectly lawful purpose institute a boycott against the employer. In the *Adt* case there was some question as to the legality of the means used to enforce the boycott, but that does not seem to have influenced the decision. Then, granting the legality of the strike, why should it be illegal to enlist the sympathies of third persons who deal with the employer? If these third persons are injured,

²⁶ See note in 32 L. R. A. (N. S.) 1017; and cases cited there, mostly New York cases.

²⁷ Thus it has been held that "a combination of employees to compel their employers, by threats of quitting and by actually quitting their service, to withdraw from a mutually profitable relation with a third person having no effect on the character or reward of the employees' services, for the purpose of injuring such third person, is a boycott and an unlawful conspiracy." (*Thomas v. Cinn. etc. Ry. Co.*, 62 Fed. 803); and that it was illegal for a union to boycott an employer of non-union labor by refusing to work for another employer who furnished him with supplies. [*Burnham v. Dowd*, 104 N. E. 841 (Mass.).] There are innumerable cases on this subject, generally decided on a question of fact.

are coerced into the boycott, they have their redress in the courts against the union. But why should the employer be entitled to plead in a controversy between himself and the union the injury of these third parties, who themselves do not complain? The employer, it is true, is injured, but he is injured in the course of fair competition between himself and the union, and it is *damnum absque injuria*. If we grant that a strike legally pursued is justified to raise wages, a boycott for the same purpose, as long as no third person complains, would seem equally justifiable, and the employer should not be heard to voice a third party's injury in protection of himself.

Perhaps the real explanation of the courts' antagonism to the boycott is to be found in their fear of its potentialities—for it is one of the most efficient weapons of the union. But if this explanation is true, the courts are certainly guilty of a wrongful invasion of the legislative domain and the explanation is merely a confession of this.

Closely connected with the boycott and apparently a much more effective means of enforcing the boycott is the frequently occurring rule of a labor union forbidding its members to handle non-union material, that is, material prepared by non-union men. It has been held that the union may under conditions issue such a rule. Where the object of a labor union or the purpose of its action under this rule is principally to injure another or his property, the agreement forming the union is unlawful; but where the purpose is only to advance the interests of the members of the union the union is not illegal and such rules may legally be enforced.²⁸ Here, again, the distinction crops up between the "mutual advantage" of the laborers and the malicious injury of another. "So long as the motive [of the rule] is not malicious, the object not unlawful nor oppressive, and the means neither deceitful nor fraudulent,

²⁸ *Bossert v. Brotherhood of Carpenters and Joiners of America*, 137 N. Y. 321; *Gill Engraving Co. v. Doerr*, 214 Fed. 111.

the result is not a [illegal] conspiracy, although it may necessarily work injury to other persons."²⁹

The distinction between this rule and the boycott is not easy to perceive at first blush. The courts have distinguished it upon the ground that the rule was laid down before any difference arose between the employer and the union, and that hence it might impliedly have entered into the service contract. Moreover, as stated above, the courts have recognized the direct interests of the laborers in the rule; and, finally, the quarrels have been directly between the employer and the union, the boycotted dealer did not enter into the consideration. This method of boycotting is naturally only applicable in well-organized trades with a stable membership, and the older and more stable unions have to a great extent made use of it. It would seem one of the most effective instruments that the unions can use; for, not being tainted with the ancient obloquy of trade unions, the courts have been more liberal in their attitude toward it.

Precisely corresponding to the boycott, but issuing from the other party to the controversy, is the blacklist. It is a weapon that employers have been fond of using against the strike. As such it would seem to have generally been held legal. That is, if the employer of the shop which is the object of the strike should distribute to his brother employers, who are associated with him in trade agreements, a list of his striking employees with the intention that these other employers should refuse the strikers employment in their shops, the courts would almost certainly hold such a blacklist lawful. But it is practically impossible to be absolutely certain how far the courts will go in holding any blacklist lawful. They are here confronted with the same conflict that has been evident in all the law of union activities, the conflict of the right of the employers to carry on their business as they see fit and the right of the employees

²⁹ National Fireproofing Co. v. Mason Builders' Ass'n, 169 Fed. 256, 26 L. R. A. (N. S.) 148.

to the free use of their laboring powers. As was said in a recent Maryland case, "neither [the employer nor employee] has the right to interfere, without cause, with the business or occupation of the other."⁸⁰ And the courts, it would seem, are more opposed to the combination manifesting itself in the blacklist than they are to the combinations of laborers against laborer. We have seen in our consideration of strikes directed against the non-union workman, how eager the courts are to protect the laborer against the combination, but they have been somewhat restrained by the fact that the two competitors are in the same economic position. The blacklist, however, represents a combination of economically strong employers functioning to deprive a workman of his only means of livelihood. It is natural that the courts should be more prone to condemn the blacklist than a combination of workmen.

The blacklist, nevertheless, does not always offend the courts. As a counter-weapon to the strike, as has been said, the blacklist is a proper thing. On the other hand, if the list circulated among the employers is tinged with slander, the workman has naturally a clear right of action against the employers. In between these two extremes, it is often difficult to classify a blacklist. "Any malicious interference with the business or occupation," as our Court of Appeals has said, "if followed by damage, is an actionable wrong."⁸¹ This is a safe enough guide where actual malice, or malice in fact, is evident in the case, as it was in our Maryland case; but the concept of malice in law, though often used by the courts in their reasoning in blacklisting cases, is no longer of much practical use because of its extreme elasticity. It would, perhaps, be sufficiently correct to say that when a blacklist is used against striking employees or to gain a legitimate interest of the employers, it is legal, but when it is used merely as a disciplinary

⁸⁰ *Willner v. Silverman*, 109 Md. 341; 71 Atl. 963; 24 L. R. A. (N. S.) 895 (1910).

⁸¹ *Ibid.*

measure against an employee and to attain no advantage for the employer, it is an actionable tort against the individual workingman. That, at least, is the Maryland law.

This careful regard of the courts for the welfare of the individual is not directed strictly towards the unions, and is, therefore, perhaps not appropriate in this place; but so intimately is the blacklist related as a counter measure to the strike and boycott that the unions have really been much strengthened by this judicial curtailment of the employer's powers. It seems, in most cases, that the decrees of the courts have been adequate enough for the protection of the laborers, but the public has not been—or, perhaps, it is more correct to say, the unions have not been—sufficiently satisfied with this judicial protection; and in many states laws have been passed prohibiting employers from circulating blacklists. Innocent information is not prohibited, so that these statutes have uniformly been held constitutional. Maryland has no such statute, but from the tendencies of the court in the case of *Willner v. Silverman*²² such a statute if it could be made effective would seem desirable, especially from the union standpoint.

At the possible risk of digression, I want to call attention here to perhaps the greatest encouragement that has yet been extended to unionism by legal enactment. With no special reference at present to Maryland law, it is yet indicative of a tendency in the law which may at some future time be realized. There have been several state statutes and one federal statute relating to interstate commerce which have declared criminally illegal the discharge or threatened discharge of employees because of membership in any labor organization. Practically all of these statutes have been held unconstitutional as depriving the employer of the right of contract without due process of law; but in the Supreme Court²³ three forcible dissenting opinions

²² *Ibid.*

²³ *Adair v. U. S.*, 208 U. S. 161; 52 L. ed. 436; and see note in this edition on *State cases*; *Coppage v. Kansas*, 236 U. S. 1; 59 L. ed. 441.

were filed against this position, the one by Justice Holmes in the earlier case in particular being most suggestive of future modifications of the severity of the doctrine underlying the majority opinion.

The closed shop contract is the highest attainment of trade unionism. It is still a method, a means to an end, but it smacks more of the ultimate desideratum than do any of the other activities of the unions. Once the closed shop is attained in an industry, collective bargaining has achieved its most valuable guarantee; and collective bargaining is a primary goal of unionism. Unions, according to their advocates and publicists, are striving, not for the elevation of the workingman above his rightful economic condition, but for the absolute equality of the laborer with the capitalist and the landlord as a claimant in distribution. All the phenomena of unionism which we have considered are indications of this ambition—the strike and boycott, the weapons of the militant, struggling union; the agreement against non-union material, a defense of the victorious union; and the closed shop, the security of the old and firmly established union. It is therefore obvious that the law of the closed shop agreement—more often an agreement than a formal contract—will be somewhat different from that of the other methods of unionism. Yet, in studying the agreement against non-union materials and the strike against the non-union workingman, a foundation has been laid down.

The law seems to be that an agreement between one employer and a labor union that he will employ only such laborers, members of that union, as the union shall specify is completely enforceable. Equally unenforceable is an agreement on the same point between all the branches of a labor union within a certain territory and all the employers of that trade within the same territory.²⁴ Between these two extremes lies the debatable ground. It is assumed, of course, in this discussion that the benefit of the

²⁴ *McCord v. Thompson-Starrett Co.*, 198 N. Y. 587; 92 N. E. 1090.

agreement is material to the two parties and that there is no malice. The law as to this has been sufficiently threshed out.⁸⁵ The law, then, with respect to the closed shop agreement is precisely that of the common law of contracts in restraint of trade, that of conspiracies in unreasonable or indirect restraint of trade. Where the agreement between the employer and the union is too monopolistic within too comprehensive a territory—of course much smaller than the unreasonable district in trade monopolies—the agreement is an unreasonable restraint upon the individual's freedom of contract and the competition of the non-union laborer is too completely stifled. This is the opinion of the courts. In the eyes of the economist—and the argument seems sound—a trade union with complete monopoly of the labor in its district is the acme of perfection of competition, of competition among the elements of production.

The courts seem to have been led into this distinction as to extent of monopoly in a rather haphazard manner, if not absolutely against their will. The law of the closed shop has been most fully developed in New York. In the earliest case⁸⁶ the court held invalid a contract between a brewers' association and a labor union providing that no employee of the association should be allowed to work for longer than a specified time without becoming a member of the union. In the second case,⁸⁷ after several appeals and reversals, the court held valid a contract between an employer and a labor union providing for an absolutely closed shop. In this case the court specifically stated that the early case was not overruled. The critics immediately emphasized the conflict. The only way of resolving the conflict was to develop the distinction between the single employer in the enforceable agreement and the association

⁸⁵ Cases concerning the closed shop in which this point is developed are: *Berry v. Donovan*, 188 Mass. 353; 5 L. R. A. (N. S.) 899; *Kissan v. U. S. Printing Co. of Ohio*, 199 N. Y. 76; 92 N. E. 214; *Hoban v. Dempsey*, 104 N. E. 717 (Mass.).

⁸⁶ *Curran v. Galen*, 152 N. Y. 33; 37 L. R. A. 802 (1897).

⁸⁷ *Jacobs v. Cohen*, 183 N. Y. 207; 2 L. R. A. (N. S.) 292 (1905).

in the unenforceable. This distinction was developed in subsequent cases, and has been accepted as the rule in cases in other states.³⁸ Naturally, what is lawful in this respect for the labor unions is lawful for the employers, and there are several cases in which open shop agreements between employers aimed directly at the unions have been held legal.³⁹

It might be profitable to present a brief and concise resumé and to draw some conclusions from the Maryland law of labor combinations before proceeding to the specific statutes which are based upon or closely allied to the existence of labor unions. Since the statute of 1884 labor organizations are not per se conspiracies. An act which is lawful for an individual is therefore perfectly lawful for a union to undertake, with the one possible exception, most apparent in the law of picketing, that in certain circumstances numbers themselves may be a menace to the peace of society. However, there is growing up in the law of torts a theory which is finding great application in labor cases that an act, though conducted for perfectly legitimate ultimate ends and in a perfectly lawful manner, may yet be actionable if immediately inspired by an improper motive. Thus a strike lawfully conducted to strengthen the union may still constitute a tort against a non-union man if its motive is to secure his discharge. On this proposition of law is based the rule that the activities of labor organizations must have the direct purpose of improving the welfare of the members of the association, and may only incidentally, indirectly and perhaps unsubstantially affect a third uninterested party.

But these generalities do not help us much to appreciate the trend of the Maryland decisions. The law of the union is in its present state of uncertainty because of conflict of

³⁸ *Connors v. Connolly*, 86 Conn. 641, 45 L. R. A. 564; and note in L. R. A.

³⁹ *Hitchman Coal & Coke Co. v. Mitchell*, 172 Fed. 963; *Goldfield Consol. Mines Co. v. Goldfield Miners' Union*, 159 Fed. 500.

two generalities: "improving the welfare of the members" and the indirectness with which the interest of a third party is affected. The courts until very recently have been inclined by their training, by their leaning in the direction of the individualistic philosophy of freedom, towards protecting the rights of the third party, no matter how incidentally they may be infringed upon. It is fair to say that they did not truly understand the significance of unionism, the attempt to secure economic equality by strengthening the bargaining power of the laborers. Maryland law, of which the last case was decided in 1909, is still in this stage. In the Lucke case the court recognized no rights of the union to secure employment for its own members, but considered merely the technical right of the individual. In the Adt case the court might have justified its decision on certain forcible methods of the union, but it contents itself with unconditionally outlawing the boycott no matter what the actual economic conditions may be. Precedent is still supreme. In the Willner case, the last word on the subject, the court might possibly be said to have taken subconscious cognizance of economic forces, but in reality the decision in favor of the unions was reached by purely individualistic reasoning. It may be hoped in view of certain tendencies manifesting themselves in other lines of decisions that the Court of Appeals will in its next union case take a broader view of the province of law, but as the decisions now stand, though the results in all these cases are perhaps justifiable, the law is not in a satisfactory condition and Maryland does not deserve a position with the more advanced states.

Statutes Relating to Unionism.—The union label is now recognized as one of the useful, if not necessary, instruments of organized labor. The law on the subject is rather difficult and the decisions most conflicting; but the Maryland legislature of 1892 has relieved us of the necessity of anything more than a cursory sketch of the unwritten law. In the earliest cases the union label was defended by its advocates as a trade-mark. The majority of decisions, how-

ever, held that inasmuch as the union is not the owner, manufacturer or seller of goods to which the label is attached, the label is not a valid trade-mark nor entitled to protection or registration as such.⁴⁰ Rebuffed by the common law courts, the unions strove in equity proceedings to enjoin the counterfeiting and unauthorized use of the label. Here they were more successful, the courts viewing the label as union property. The courts declared that the concept of property should not be fixed, but progressive, developing with the growing society. Surely, therefore, the label is property. Witness the reasoning in a Maryland case in a lower court:

"The object and effect of this label, as used by plaintiffs on their associates, is to increase the value of their labor. . . . It will not be denied that every freeman has a property right in his own labor. . . . From this broad principle it is easy to develop the particular proposition, that an association of men who combine for the purpose of increasing, by legitimate means, the general demand for their common labor, have a property right in whatever lawful instrumentality they can succeed in creating and controlling for that purpose.

"If the combination for that purpose be legitimate, and the label itself as used be a lawful instrumentality and contains no fraudulent misrepresentation, the label is entitled to the recognition of a court of equity as a property right, and any fraudulent imitation of it will be suppressed."⁴¹ The reasoning here employed is valid and convincing, but nevertheless this opinion is in conflict with most courts of the country which have refused to view the label as property in the absence of statute.

Not satisfied with this tendency in the Maryland law—for, of course, it was not authority since the case did not reach the Court of Appeals—the unions caused the enact-

⁴⁰ See Martin, *Law of Labor Union*, pp. 423-429, for a more detailed discussion with references.

⁴¹ *Cigar Makers' Union of Balto. v. Link*. Baltimore Circuit Court, 1886; reported in 29 L. R. A. 202, note.

ment of the law referred to above, legalizing and protecting union labels.⁴² The first section declares that "whenever any . . . union of workingmen have adopted, or shall hereafter adopt for their protection any label . . . announcing that goods to which such label . . . shall be attached, were manufactured by a member or members of such union, it shall not be lawful for any person or corporation to counterfeit or imitate such label;" and following sections declare such counterfeiting a criminal proceeding, enjoined by courts of equity, and cause for damages. Registration of the label is also provided for. No case seems to have arisen under this statute; but in other states similar statutes have been attacked as class legislation, but without exception they have been upheld.⁴³

There is, moreover, on the statute books a law which was passed in the interests of, if not as a direct political plum for, the labor unions which is absolutely and undeniably unconstitutional. It is the law⁴⁴ which directs the "public printer" to affix to all public printing the label of the International Typographical Union. Precisely similar ordinances and acts have been held unconstitutional in many Western States as in clear violation of the guarantee by the Fourteenth Amendment to the federal Constitution of the security of property under the due process of law clause.⁴⁵

The final problem which the state has to solve with reference to unionism may under certain conditions become the most important of all. It is the reconciliation of the two quarrelling factions in any labor dispute or the prevention of the dispute itself. There are two main classes into which legislation of this sort falls, arbitration and conciliation, and each of these is again sub-divided into compulsory and voluntary methods.

In arbitration both sides, labor and capital, appear before

⁴² Acts 1892, Ch. 357; Code 1912, Art. 27, Secs. 50-55.

⁴³ See note in 39 L. R. A. (N. S.) 1190.

⁴⁴ Code 1911, Art. 78, Sec. 9.

⁴⁵ See *Miller v. Des Moines*, 23 L. R. A. (N. S.) 815 (Iowa), and note.

an arbitral board, usually, though not always, composed of a representative of each contestant and a non-partisan chairman, and present their case. The board deliberates and hands down a binding decision. If reference to an arbitral board is compelled by the State, the arbitration is compulsory; if reference to the board is dependent upon the agreement of the parties to the dispute, the arbitration is voluntary. Purely voluntary arbitration is rarely found in present day statute books, for it has been found that state activity is entirely unprofitable in this method of industrial peace. Compulsory arbitration has been tried in Australia with varying results in the different states. It suffers from the fact that there is no settled theory of wages discovered as yet upon which the board can render its decision, which must accordingly be a compromise, a result not too favorable to the principle of collective bargaining. Compulsory arbitration would possibly be unconstitutional in the United States.⁴⁶

Midway between arbitration and conciliation as a means of industrial peace is a hybrid form of endeavoring to force peace by an impartial investigation of the dispute and a full publication of the results of the investigation, both facts and conclusions. By providing publicity, this method seeks to inform public opinion of the true state of affairs, and by directing it against one contestant, to compel this contestant to yield in the controversy. This method usually occurs in legislation in company with voluntary arbitration or conciliation and smacks a little of each of these. It differs from the compulsory methods in that it relies upon the force of public opinion rather than on the physical sanction of the State. Properly administered it should be effective.

Compulsory conciliation, or perhaps more correctly compulsory investigation, is a logical development of the method of publicity. It seeks to prevent industrial unrest

⁴⁶ See, however, *Wilson v. New* (decided March 17, 1917) as lending some credence to the contrary view.

rather than to reconcile two contending parties. As successfully employed in Canada, workmen and employers before declaring a strike or lock-out must appear before a conciliation board and state their case in full. This board then gives its decision and award which, however, is not binding upon either party: the strike or lock-out may be consummated as though there were no decision. The findings of the board have, however, been meanwhile published, and public opinion is relied upon to prevent the party to whom the decision was adverse from carrying out its intent to strike or lock out. This scheme seems the one most suited to an American State and its success in Canada testifies to its worth.

The Maryland laws belong to the class of voluntary arbitration laws and one of them has the added provision for an impartial investigation. The first law,⁴⁷ passed in 1878, although it does not explicitly refer to strikes, provides that "whenever any controversy shall arise between any corporation incorporated by this State in which the State may be interested as a stockholder or creditor, and any person in the employment of such corporation, which, in the opinion of the board of public works, shall tend to impair the usefulness or prosperity of such corporation, the board of public works . . . shall have the right to propose to the parties to said controversy that the same shall be settled by arbitration"; and, upon the consent of the parties to the arbitration, the board is given the power to make a conclusive award. This law is only of antiquarian interest and, as far as I have been able to ascertain, has never been made use of in a labor dispute. It is of the most inadequate type of this kind of legislation.

The present law was first enacted in 1904, but was radically amended by an addition in 1916.⁴⁸ The early law gave to the then Chief of the Bureau of Statistics and In-

⁴⁷ Laws 1878, Ch. 379; Code 1912, Art. 7.

⁴⁸ Laws 1904, Ch. 671; Code 1911, Art. 89, Secs. 3-11, as amended by Laws 1916, Ch. 406.

formation power to mediate, arbitrate or investigate. Though still on the books, the provisions of this law have been repeated in a form so much more efficient in the 1916 amendment that the early law should be practically superseded. No description of this amendment could be more clear or concise than the text itself.

"It shall be the duty of the State Board of Labor and Statistics to do all in its power to promote the voluntary arbitration, mediation and conciliation of controversies and disputes between employers and employes, and to avoid resort to lockouts, boycotts, blacklists, discriminations and legal proceedings in or arising out of such controversies and disputes and matters of employment. In pursuance of this duty, the said board may, whenever it deems advisable, but subject to the approval of the Governor, appoint boards of arbitration for the consideration and settlement of such controversies and disputes, and may provide for the necessary expenses of such arbitration boards, and for such reasonable compensation to the members serving thereon as the said board may deem proper, not exceeding, however, the sum of five dollars per day for each member for each day during which such member is engaged in work upon said arbitration boards. The said board shall prescribe rules of procedure for such arbitration boards, and the said arbitration boards shall have the power to conduct investigations and hold hearings, to summon witnesses, and enforce their attendance through the ordinary processes of law in the cities and counties in which such arbitration boards may meet, subject to all the penalties for non-attendance to which witnesses in ordinary civil cases are subject, and in like manner may require the production of books, documents and papers and may administer oaths, all to the same extent that such powers are possessed and exercised by the civil courts of the State; and said arbitration boards shall make, report and publish findings for the settlement of such controversies and disputes. The said Board of Labor and Statistics shall itself have like power to conduct investiga-

tions and hold hearings, summon and enforce the attendance of witnesses, administer oaths, require the production of books, documents and papers, and make and publish reports and findings with respect to any and all matters covered by this section. Subject to the approval of the Governor, the board may appoint and designate a deputy, and fix his compensation, who shall be known as the chief mediator, and who, together with any assistants who may be assigned by the board, shall have in charge the execution of the provisions of this section, under the direction and supervision of the board. The chief mediator may act upon any board of arbitration, but in such event he shall receive no compensation therefor in addition to his ordinary salary." This law, providing as it does for arbitration, and if that fails for investigation and publication with very efficient means of administration, is about as good a law as could be hoped for. It might be argued, and the author does believe, that compulsory conciliation would be a more effective means of industrial peace, but the law as it stands is adequate. If it fails in its purpose, it will be because of the inevitable weakness of a law depending on public opinion for its sanction or because of a slackness in its administration.

CHAPTER III

THE WORKMEN'S COMPENSATION LAW

History.—The Workmen's Compensation Law occupies a peculiar place in the study of the labor law. It differs from the law considered in the last chapter in that it is the result of a definite policy of state activity and is not a growth of the common law. It differs from the statute law, which will be the subject of the following chapters, in that it is not an addition to, but an amendment of the common law. It is the only instance we have in the field of Maryland labor law of a deliberate wholesale repeal of a whole section of common law principles which were conceived to be antiquated and unsuited to modern industrial conditions, and the substitution for them of a new statutory system of law.

Maryland's experience with workmen's compensation laws has been peculiar and somewhat disconcerting. It was the first State in America to adopt this now almost universal social legislation, but it was decidedly not in the van in adopting a really satisfactory law, if indeed the present law is entirely satisfactory. Its priority in the field is perhaps explained by the horribly inequitable degree to which its law of master and servant, especially the harsh doctrines of assumption of risk and fellow-servant negligence, had developed.

The first act of 1902,¹ "conceived in ignorance and quickly forgotten," was an act to create a Cooperative Insurance Fund. The law was limited in scope, applying only to "coal or clay mining, quarrying, steam or street railroads . . . and any incorporated town, city or county engaged in the work of constructing any sewer, excavation or other

¹ Laws 1902, Ch. 139.

physical structure, or the contractors of any such town," etc., an estimated coverage of about ten thousand employees.² The act was what may be called a pseudo-elective compensation scheme, which will be treated at greater length in the following section. It provided that the employers covered should be liable for "death or injury caused by the negligence of the employer or by that of any servant or employee of such employer" unless they contributed to the insurance fund which was provided for by the statute. Half of these contributions, the amounts of which were set forth in the act, might be deducted from the wages of the employees. The only insurance provided was a benefit of one thousand dollars for the death of every employee occurring "in the course of employment and by causes arising therein." No provision was made for compensation for permanent or temporary injury, and in this respect the workman seemed worse off than before the passage of the law. The only principle of compensation which seems to have been accepted in full was the liability of the employer for the faults of his employees. The law was of questionable value as a piece of social legislation; its real value was as an opening wedge for future enactments.

This act remained in force for nearly two years, during which time it seems to have been well administered, though only five death benefits were paid out of it. The fund was protected from insolvency by the mutual insurance feature which was borrowed from Germany—practically the only sound feature which was obtained from the extensive experience of European countries. In 1904, however, in a case in the Court of Common Pleas of Baltimore City³—the act never came before the Court of Appeals—the law was held unconstitutional, not as abrogating the constitutional rights of the employer, as we would generally expect to-day, but as denying to the employee a jury trial when he

² See G. E. Barnett in 16 *Quarterly Journal of Economics*, p. 591.

³ *Franklin v. United Railways and Electric Co.*, reported in the *Daily Record* for April 29, 1904.

wished to recover for the negligence of the employer. "The act," said the court, "embraces cases where the death had been caused by the negligence of the employer, cases where there would have been clear right of action in the courts under existing law. It enacted that employers who had made the payments provided in the act should by such payments be exempted from further liability. The effect was . . . to take away from citizens a legal right which they had theretofore enjoyed, and which could be enforced by them in the courts, and also to deny them a right to have their cases heard before a jury." The court seems plainly in error in the first part of its decision, for it was decided as early as the case of *Munn v. Illinois*⁴ that "a person has no property, no vested interest, in any rule of common law. . . . Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." As to the matter of a jury trial the question is more complex and difficult. Suffice it to say that jury trial is not abrogated if the act is a just exercise of the police power; and, moreover, most courts in the case of pseudo-elective acts have refused to take cognizance of the implied coercion in these acts and have decided that where those affected have consented to be governed by the law there is no deprivation of due process. That is to say that where parties have consented to try their case without the intervention of the jury, even though there is insidious, hidden coercion pressing upon them, there is no infringement of their right to a jury trial. Such argument is of little value and is perhaps contrary to Maryland precedent, but the courts, in spite of criticism,⁵ have often used this species of reasoning.

In 1910 the void created by this decision was filled with a new cooperative relief fund,⁶ but even further limited

⁴ 94 U. S. 113-134.

⁵ See Freund, *Constitutional Status of Workmen's Compensation*, in 2 *American Labor Legislation Review*, 43 (1912). In the present (1917) Maryland law the servant has reserved to him the right of a civil suit when the employer is negligent.

⁶ Laws 1910, Ch. 153, as amended by Laws 1912, Ch. 445.

this time to clay and coal mining in Alleghany and Garrett counties. The act provided a compulsory, cooperative insurance scheme; but the constitutional difficulty caused by the earlier decision was obviated by allowing the employee to sue in the courts provided he renounced all and had accepted no benefits from the Relief Fund. Another constitutional question was avoided by calling the contributions of the employers and employees "taxes," thereby resting the compulsory power exercised by the State upon its taxing rather than upon its police power. The advisability of the change may, however, be considered doubtful—a leaping from the frying pan into the fire, for here the constitutional provision against levying a tax for a private purpose stands rather obtrusively in the way, but it may be said here that such a tax has been upheld in a Western court as analogous to a license tax.⁷

This act, in spite of the constitutional change of face, was quite an improvement over the former law from a social viewpoint. It provided, as intimated, for a fund equally contributed by employer and employee—though for administrative purposes the employer paid the whole tax—which was put into the hands of the county commissioners of the two counties to administer. The insurance for "injuries sustained in the discharge of duty" and for death are far from sufficient, but there is a great increase over that provided in the original act. \$1500 is granted to dependents upon the death of the wage earner; total disability entitles the injured to \$750 plus one dollar a day, excluding Sunday, for twenty-six weeks, about \$180 additional; partial disability entitles him to \$375 with the same addition; and temporary disability to the dollar a day benefit for twenty-six weeks. The waiting time in all cases is one week. Although the law provides for the payment of all benefits in lump sums, the legislators recognized the possi-

⁷ See *State ex rel. Davis-Smith Co. v. Clausen* (Wash.), 117 Pac. 1101. The Maryland law was upheld in analogy to this case, see 128 Md. 564.

ble evil of this method and strove to mitigate it by constituting the county commissioners a judicial board, first, to determine who were "dependents" and, second, to appoint bonded personal representatives to administer the reliefs granted to the beneficiaries. This law seems to have been successful, and its effectiveness was only terminated by the passage of the present general compensation act.

Again in 1912 there was introduced before the legislature a Workmen's Compensation bill, this time general and compulsory in character. When the bill finally emerged, however, it had been completely emasculated and converted into a harmless, inactive elective compensation law.⁸ This provided that it should "be lawful for any employer to make a contract in writing with any employee whereby the parties may agree that the employee shall become insured against accident occurring in the course of employment which results in personal injury or death, in accordance with the provisions of this act; and that in consideration of this insurance the employer shall be relieved from the consequences of acts or omissions by reason of which he would without such contract become liable." Being purely elective, no constitutional questions could arise from the enforcement of this act. Moreover, the law has been entirely inoperative and is only interesting as the direct forerunner of the present law.

The act of 1912 covered all injuries "arising out of and in course of employment" except where the injury "is the result of the employee's intoxication, or wilful and deliberate act or deliberate intention to produce such injury." The dependents are defined to be "widow, widower, father, mother, son or daughter" unless otherwise provided. Nothing is said with regard to alien dependents. The schedule of benefits, although still rather meager, is again an improvement over the 1910 Act, and is again topped by the present act. It provides for a death benefit of thrice the

⁸ Laws 1912, Ch. 837.

annual wages, but not less than one thousand dollars; in case of total disability for a benefit of at least fifty per cent of the wages during disability; and in case of partial disability for the difference between the total disability benefit and what the injured man can earn. The waiting time is again one week. The administration is vested in the parties to the contract, but the insurance commissioner has full powers of investigation. In case of any dispute as to award, a board of arbitration is provided for.

These three early laws were repealed by the passage of the 1914 Workmen's Compensation Law,⁹ which embodied many of the best features of the earlier laws, especially of this last elective Employers' Liability Law. The new act, however, is such an advance over these experiments that a comparison between them is hardly profitable. It will be better, therefore, carefully to examine and analyze this law as a piece of social legislation in comparison with certain ideals which have been formulated for compensation schemes and in comparison with the various compensation schemes embodied in the laws of other states. After this study, it will be necessary to consider the legal aspects of the act.

The Present Law as Social Legislation.—It seems hardly necessary at this late date to enter upon any detailed argument with reference to the merits and demerits of workmen's compensation laws. It is, nevertheless, almost impossible to begin any discussion of this legislation without at least some short summary of the pros and cons of the question.

The objections to the laws are based upon the common law individualistic conceptions of responsibility. An individual, it is argued, should be responsible only for his own fault and negligence. By the common law the employer must supply the employee with a reasonably safe place to work in, reasonably safe materials and machines to work

⁹ Laws 1914, Ch. 800; Code 1913, Art. 101.

with, and reasonably competent fellow-servants to help him in his work. If the employer complies with his duties and the employee is nevertheless injured, the loss must lie where it falls, for on entering an employment the employee assumes the risks of that employment, and visualizing the possibility of injury demands higher wages as a sort of insurance. When confronted with the proposition that the average workingman is by nature an optimist and neglects or is unable to insure himself, the individualist shrugs his shoulders and conveniently washes his hands of the improvident laborer. He quite as conveniently waves aside the inequality in the bargaining power of the two factors, and assumes that the employee is as capable of refusing undesirable employment as the employer is of refusing employment to the too pessimistic employee. The common law individualist, however, is stronger when he argues against saddling the employer with the burden of providing compensation for all accidents occurring to employees arising out of their employment irrespective of cause. This position is absolutely invulnerable unless it can be proved that the employer is in a position to shift the whole cost of the compensation to the trade and thence to society.

The arguments for compensation, on the other hand, attack the problem most successfully from the opposite, the social point of view. From this standpoint the indictment of employer's liability is complete. Unfortunately, we have no Maryland statistics, but it is safe to assume that her experience is not materially different from that of other States. In the first place, an enormous majority of the industrial accidents under the common law system of reparation go absolutely uncompensated. Out of a total of 694,212 injuries cited in the New York commissions' report, only 88,841 or 12.78 per cent were compensated; and even the fact that this total included minor injuries, at the most fifty per cent of all, does not materially vitiate the conclusion drawn. Moreover, when recovered—and the delay is often great and serious—the compensation is usually most inade-

quate, if not perchance superfluously generous. "A good deal to the very few and nothing or very little to most seems to be the principle upon which the liability system worked itself out."¹⁰

The common law doctrines of assumption of risk, contributory negligence and fellow servant negligence have also come in for their own special condemnation: the assumption of risk theory on the grounds explained above; the contributory negligence theory as being inequitable in thrusting upon the employee full liability for partial fault, in its essence a lazy rule of expediency; the fellow-servant doctrine as being totally inadequate in this day of enormous factories and multitudinous coemployees, many of them in entirely separated departments. Moreover, the hostility aroused under common law principles between the laborer and his employer by the consequent law-suits and bickerings is surely not conducive to economic peace and mutual understanding. Finally, and this argument being expressed in dollars and cents has always been most potent with the layman, the cost of administration, the lawyers' fees and the court costs, have annually mounted to intolerable figures. This was a direct burden both upon society¹¹ and upon the injured workingman who could ill afford the increased load. All of these defects of the liability system worked a hardship upon the laborer, generally causing him to lower his standard of living, if not to become an actual object of charity. To prevent this, to provide compensation for every injury when most needed, to save lawyers' fees, to promote amicable relations between the employer

¹⁰ J. M. Rubinow, *Social Insurance*, p. 94. This book is rich in statistical matter. Another valuable piece of statistical work is contained in the congressional report on compensation, in S. Doc., vol. 12, 62d Cong. 2d sess.

¹¹ There is some argument that the cost of administration of the compensation law, the salaries of the commission and its other expenses, will be as great as, if not greater than, the saving accomplished by the diminution of court work. This argument, even if true, can weigh little; for it is not the cost of government which the compensation laws are striving to effect, but the social cost of incapacitated, degraded workingmen.

and the employee, these are the aims of compensation. To put upon the consuming public the duty of preventing poverty instead of mitigating wretchedness.

The arguments are clearly in favor of compensation; yet the inevitable lag of legislation, the opposition, entirely explicable, of the capitalist class to any social legislation which will affect their pocketbooks,—and all social legislation must necessarily affect their pocketbooks in the first instance, though the intention is that part, at least, of the burden shall be shifted,—the technical shortcomings of the average state legislature; these have kept Maryland for twelve years with insufficient compensation laws on her statute books.

The Maryland act of 1914, however, provided for a compulsory system of compensation insurance in certain enumerated extra-hazardous employments.¹² The legislature flatly challenged the constitutional obstacle of due process of law by making the law absolutely compulsory for those employments to which it applies. This system of absolute compulsion is in complete accord with theoretical opinion, but in almost as complete contrast to the actual performances of various States. Only four states out of twenty-four, that is, Maryland, New York, Ohio and Washington, have compulsory schemes. The others have sought to appease the courts with what I have denominated in this discussion pseudo-elective schemes. These latter laws are purely elective, though often with a presumption of election unless notice to the contrary be given; but those employers who fail to elect are penalized by being deprived of the defenses of assumption of risk, fellow-servant fault and contributory negligence, and burdened with the added disadvantage of popular disapprobation in the jury trial which must take the place of compensation proceedings. The employee who does not elect is left in the same position as he was before the passage of the act. That is to say, the law

¹² Sec. 32 as amended by Laws 1916, Ch. 597. See also *American Ice Co. v. Fitzhugh*, 128 Md. 382.

states in effect first to the employer: You are perfectly free to choose whether you will come under the compensation scheme or remain under liability principles; but, if you do not choose the new compensation, you will be deprived of your three common law defenses and the jury will hardly be disposed in your favor. Then to the employee: You have the same choice; but, if you do not take up with our plan, expect no favors from us. The courts see no coercion in this. The end attained by this system is practically the same as that reached by the compulsory system, but in a clumsy manner. The pseudo-election has been a sop to the courts, which have refused to see any deprivation of due process to him who has chosen to be so governed. The subterfuge has been successful, but the courts have opened themselves, and rightly, to the charge of inconsistency, a quality which, interesting as it may be in other fields, is deadly to the law.¹³

The Maryland law, as has been said, enumerates the extra-hazardous employments which are covered, making provision, however, in a blanket clause for all hazardous employments not specifically enumerated. The presumption, therefore, is that any dangerous occupation is covered by the act. On the other hand, "farm laborers, domestic servants, country blacksmiths, wheelwrights and similar rural employments, casual employees, and any employee whose salary exceeds \$2000 per annum" are specifically excluded.¹⁴ Practically the same exclusion exists in all States, sometimes by explicit exclusion as in Maryland, as often by limiting the application of the compensation scheme to those establishments employing more than four or five workmen. This exclusion is usually justified upon the grounds of administrative expediency, but it is also true that the conditions in these employments are still practically the same as they were before the Industrial Revolution and therefore do not so forcibly demand an amendment of the

¹³ Freund, 2 American Labor Legislation Review, 43.

¹⁴ Sec. 63.

law of that period. In addition to the enumerated list of employments, the Maryland law provides a joint elective system of compensation for all other employments in the State.¹⁵ That this provision will be often elected seems doubtful.

The provisions for compensation¹⁶ in the Maryland law cannot be rated as high as can the general scheme. The increased cost of casualty insurance to the employer has been such a deterrent upon the legislators that they have failed rather completely to enact wisely and sufficiently. The sudden increase of burden upon the employer which must necessarily accompany compensation has indeed been the real obstacle in the path of these laws; yet, if we correctly understand the theory of compensation, this increased cost is no real objection.

It has been long ascertained that one of the foremost causes of poverty is the death or disability of the wage earner of the family. Poverty was not originally looked upon as a social disease and the natural remedies for it were individualistic in character. The supremely moral and provident device of "setting aside for the rainy day" was the panacea for all poverty. It proved hardly a feasible social cure for families stricken by an industrial accident. The average workingman is naturally optimistic and rarely visualizes the risk of his employment. Cooperative societies, furnishing social inducements as well as fraternalistic benefits, were devised by the master minds to cure to some extent this insidious evil. By distributing the risk, these societies offered a degree of security at a low rate. The remedy, however, was not complete; for these societies, which developed into guilds and finally into the modern labor union, naturally did not include the entire working population. The outsiders still possess, of course, the old resource of self-insurance, "putting aside for the rainy day," as well as the newer idea of insurance in an organized insurance

¹⁵ Sec. 33.

¹⁶ Sec. 36, as amended by Laws 1916, Chs. 368, 597.

company. The newer plan, it would seem, is no more practicable than the older, for the workingman is naturally indifferent to insurance, especially at the high rates which his accident risk would generally bear. This antipathy, or at least apathy, toward insurance is overcome in the case of the labor union by the added fraternalistic advantages and by the attraction furnished by the increased utility of the union as a fighting machine, advantages which seem from the viewpoint of insurance of rather doubtful value because of the decrease in the security of the insurance funds. But, accepting cooperative insurance at its greatest value, society still has on its hands those poverty stricken families whose uninsured wage-earners have been incapacitated or killed by industrial accidents and those families, no less numerous, which have suffered a serious set-back in their standard of living because of insufficient insurance. Viewed, then, as social legislation and totally excluding from consideration the equities of the matter, compensation laws, providing funds to tide over all accidents and to support the dependents of killed workmen, are conceived to offset and to forestall this important cause of poverty. Society is to foot the bill and employers are expected to shift the burden which is primarily placed upon them. It is perfectly possible to argue, though it is doubtful whether the employer will enthusiastically agree with the argument, that the employer should invite a large increase in insurance rates, for it has often been demonstrated that the producer can be assured of much greater success in shifting large increases in the cost of production than small increments.

Washington is the only State in the Union, however, which has interpreted the dictum of social insurance literally. Her compensation law provides for the care of dependent widows and injured workmen on the same plan that poor relief would be granted, though, of course, on a more generous scale. Upon death, the widow is to receive twenty dollars a month for life or until she marries, with five dollars additional up to thirty-five dollars for each child under

sixteen. For total disability, the injured employee receives twenty dollars a month if unmarried, twenty-five if married, and five dollars additional up to thirty-five dollars for each child under sixteen. The compensation lasts during disability. In its other provisions the Washington law departs somewhat from this principle; but, though the compensation is somewhat low, what has been set forth sufficiently illustrates the theory of social insurance—the prevention and abolition of poverty—which has been developed in Washington.

Most of the States, however, have met the problem by providing compensation commensurate with the previous earning power of the wage-earner.¹⁷ The accidents are divided into three classes, those resulting in death, in total disability, and in partial disability; and a different rate of compensation is provided for each. The tendency, though unjustifiable on theoretical grounds, has been to divide the class of partial disability into various categories and assign a definite compensation to each kind of injury. The just method would be to compensate the injury by a payment proportionate to the loss of earning power, but the categorical method has been made use of in order to lend certainty to the amount and cost of insurance. The table on the next page shows Maryland's standing as to the rate of compensation in comparison with other industrial States.

Maryland, it is evident, ranks low compared with these other selected States. In the matter of death benefits the comparison is most favorable to Maryland, but this is merely because the other States are equally delinquent, not because Maryland is nearer the standard. New York is the only State which recognizes that the needs of a widow with children are greater than those of a widow without children. Maryland is prodigal towards the small family of dependents and penurious toward the larger one. This

¹⁷ Provision is made in Maryland (Sec. 47) as in some other States for a consideration of the possibility of increase of earning power when the injured workman is a youth.

	Standard	Maryland	New York	Ohio	Wisconsin	Massachusetts
Death						
To widow	35%	50% 416 weeks, \$1,000-\$4,250	30% 15% or 10% additional up to 66⅓%	66⅓% 312 weeks, \$1,500-\$3,750	65% Limit: 6 times annual wages	66⅓% 500 weeks, \$4,000
To children	25% or 10% additional to 66⅓%					
Total disability	66⅓%	50%	66⅓%	66⅓%	65%	66⅓%
Limit of payment	\$5-20 per week	\$5-12	\$5-15	\$5-12	4 times annual wage	\$4-10
Limit of time .....	....	416 weeks	....	....	....	500 weeks
Partial disability ¹⁸						
Limit of payment	66⅓% dif.	50% dif.	66⅓% dif.	66⅓% dif.	65% dif.	66⅓% dif.
Limit of time	\$5-20 per week	Up to \$12	\$5-15	Up to \$12	....	Up to \$10
	....	\$3,500	\$3,500	\$3,750	4 times annual wage	500 weeks
1. Hand .....	....	50%	66⅓%	66⅓%	65%	In add. 66⅓% for:
2. Arm .....	....	150 weeks	240 weeks	150 weeks	160 weeks	50 weeks
3. Foot .....	....	200 "	312 "	200 "	160-240 "	50 "
4. Leg .....	....	150 "	205 "	125 "	120 "	50 "
5. Eye .....	....	175 "	288 "	175 "	160-240 "	50 "
	....	100 "	128 "	100 "	160 "	50 "

¹⁸ Furnished by the American Association of Labor Legislation.

¹⁹ The first child is to have 25 per cent if there is no surviving parent.

²⁰ The compensation is for the loss in earning power (Dif) except in scheduled injuries.

is clearly unjustifiable legislation. Moreover, this law abruptly discontinues at the end of eight years the stipend which only too often had been just sufficient to support the widow or widower. This is hardly socially or economically sound unless based on statistics of the average length of life of a widow after the death of her husband or unless the Maryland legislature wished by enactment to spur the widow on to a second marriage.

The Maryland provision for total disability is entirely inadequate. An injured, incapacitated workman is, on grounds of abstract justice, entitled to his whole salary during incapacity. This, however, is an extreme and perhaps an inexpedient position. Some reduction has to be made chiefly to prevent malingering, but also to satisfy the practical sense of the community. In one European country, however, eighty per cent of the workingman's former earning capacity has been granted and found expedient, but in America sixty-six and two thirds per cent has been deemed sufficient. Maryland provides for only fifty per cent. More serious, however, is the limitation of even this compensation to eight years unless the laborer by dying precludes the limitation becoming an injustice. There can be no justification for thus terminating the compensation. These laws are framed to prevent poverty, not to postpone it for eight years.

The provisions for partial disability are perhaps less justifiable than those for total disability. Compensation for partial disability in Maryland is divided, as intimated, into two classifications: temporary partial and permanent partial disability, and the latter is subdivided into smaller categories. The division is entirely useless and very confusing. The compensation for temporary partial disability is fifty per cent of the loss of earning power due to the injury, the total compensation not to exceed \$3500. If, however, the same injury—and it is not impossible to conceive one—should be classed as a permanent partial disability not covered by the special schedule, the rate of compensation is the

same as that just given, but the maximum is reduced to three thousand dollars. An impasse, it seems to me. The specified schedule, as will be seen from the table, seeks to put a special price, based upon fifty per cent of the weekly wage, upon certain enumerated injuries. As was said above, these schedules are justified merely as an insurance device; as a social preventive they are unjustifiable. They would admit that a man is incapacitated by the loss of a member and needs compensation. However, in two or three years, it is to be assumed he will have recovered and have completely adjusted himself to his new mode of working, being able to earn sufficient to support himself and his family at a standard little below his former standard of living. It is absurd. Can a machinist who has lost his hand earn nearly what he has been accustomed to earn? Is a structural steel worker who has lost a leg a capable workman? The only just compensation is a percentage of the loss of earning power during the disability; yet no American State has provided unlimited compensation. Massachusetts is the most exemplary, for besides providing a compensation of two-thirds the loss of earning power during ten years, it recognizes the fact that the injured laborer will be in greater need during the first year of his injury by providing a compensation of two-thirds his wages for this year, after which the regular compensation runs. In this section more than in any other the Maryland law is inadequate and in need of amendment.

Another feature of the law which must be considered in connection with the compensation provisions of the act is the section dealing with what is technically known as the "waiting period."²¹ In order to prevent malingering and to exclude those innumerable minor injuries which it is inexpedient to compensate, all compensation laws specify a period before which no payments are granted. The standards adopted in this study specify from three to seven days;

²¹ Secs. 49 and 36 (1).

but, though in some European countries the shorter time is made use of, the prevailing practice in the United States is to enforce a waiting period of fourteen days, though in a few States it is only seven days. The Maryland law provides for a waiting period of fourteen days except in the case of total disability when the workman waits only seven days. During this waiting period the only outside help provided for the injured employee in most acts is medical and surgical aid.²² In Maryland the employee is entitled to this aid at the expense of the employer up to the amount of one hundred and fifty dollars, so that it may continue longer than the waiting period if necessary.²³

In most States the compensation provided in the sections just discussed is the sole remedy of the workingman. In Maryland, however, on account of the constitutional difficulties previously set forth, whether sound or not, it is provided that "if the injury or death results to a workman from the deliberate intention of his employer, the employee or his widow . . . may have a cause of action as if this Act had not been passed."²⁴ Except in such a case the employee or his dependents,²⁵ upon proper notice to his employer²⁶ and upon periodic medical examinations²⁷ is entitled to his compensation and he is absolutely forbidden to surrender this right by any contract.²⁸

²² It is sometimes argued against the long waiting period that the low paid laborer may be forced below the subsistence line in the first month of his injury and never again be able to pull himself above it. E. g., a laborer, with a family of four, earning twelve dollars a week, is injured. His total compensation for the first month of his injury will be just equal to his former weekly wage. The argument is strong, but seems outweighed by considerations of expediency and of penalizing improvidence.

²³ Sec. 37, as amended by Laws 1916, Ch. 597.

²⁴ Sec. 45.

²⁵ Non-resident aliens are included. Sec. 36, as amended by Laws 1916, Ch. 368.

²⁶ Sec. 38.

²⁷ Sec. 42.

²⁸ Sec. 53. A recent decision of the Massachusetts Supreme Court has stated that the compensation provided in the act does not relieve the employer from liability to the parents of a minor for loss of service. (*King v. Viscoloid Co.*, 106 N. E. 988.) It seems hardly

The compensation is paid for disability or death "resulting from an accidental personal injury . . . arising out of and in the course of employment without regard to fault as a cause of such injury" and "such disease or infection as may naturally result therefrom." However, "where the injury is occasioned by the wilful intention of the injured employee to bring about the injury to himself or another, or where the injury results solely from the intoxication of the injured employee," no compensation is recoverable.²⁹ This or a similar section has given rise in every State to an immense amount of litigation, but it will not be necessary to delay longer here than to quote the definition adopted by the Maryland commission:

"An injury is received in the course of employment when it comes while the person is doing the duty which he is employed to perform. It arises out of the employment when there is apparent to the rational mind, upon consideration of all circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises out of employment. But it excludes an injury which cannot fairly be traced to the employment as a con-

possible that such a decision could occur under the Maryland law. The Massachusetts law is a pseudo-elective law and provides only that unless the employee shall have given contrary notice, he will be assumed to have surrendered his rights to any recovery outside the law. This, says the court, does not abrogate the parents' right of recovery for it is a "rule of statutory construction that an existing common law right of action is not to be taken away by a statute unless by direct enactment or necessary implication." In the Maryland act, however, it is provided that the common law rule "that statutes in derogation of the common law are to be strictly construed shall have no application to this act" (Sec. 61); and, moreover, that payment under the act "shall be in lieu of any and all rights of action whatsoever against any person whomsoever" (Sec. 36).

²⁹ Secs. 14 and 63 (6), as amended by Laws 1916, Ch. 593. See also *American Ice Co. v. Fitzhugh*, 128 Md. 382.

tributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in the risk connected with the employment, and to have flowed from that source as a rational consequence."⁸⁰

It may be noted here that, since the compensation law does not cover occupational diseases, Maryland is without any legal remedy for this industrial evil, for under the common law doctrines it would be practically impossible to recover from the employer in the courts. The legislative principles upon which these diseases are excluded from the operation of this act are perhaps sound, but some provision should be made in a separate act for compensation of the incapacitated. It is obvious that the same reasons which demanded the passage of the compensation law, the social and individual effects of uncompensated injuries, as loudly call for an act whereby the diseases inevitable to the occupation should be borne by the occupation. Practically every European country has a law of this kind, but the acceptance of the principle has been slow in this country.

The provisions of the law which have been considered are, of course, those most important to the laborer. It is, unfortunately, this part of the Maryland law which is most deficient. However, a law is not a law until it is administered, and it is, therefore, of utmost importance to the beneficiary of the act that its administration be efficient. Fortunately, the sections of the Maryland act dealing with the administration and insurance are most complete and most satisfactory.

The greatest necessity, after once establishing the true compensation principle, is to provide some method of guar-

⁸⁰ Claim No. 224, quoting from *McNichol v. Emp. Lia. Ass. Co.*, 215 Mass. 497.

anteeing the payments to the injured employee. It is easy to conceive of a compensation law totally invalidated by the inability of the employers to make sufficient payments after the accident because of insolvency or other unforeseen difficulty. Some European countries have passed laws without any provision for the securing of the compensation, leaving everything to the individual initiative of the employer; but in the United States it has been unusual not to compel some kind of insurance. In Maryland, under a heavy pecuniary penalty and the added disadvantage of the abrogation of his three common law defenses in any suit arising during the time of his non-coverage,²¹ the employer is compelled to secure the compensation due from him either by insuring in the State Accident Fund, in an old line casualty insurance company or mutual insurance association authorized to carry workmen's compensation insurance and under the supervision of the insurance commissioner, or by convincing the State Industrial Accident Commission that he is strong enough financially to carry his own insurance.²² The Industrial Accident Commission has wide powers of inquisition and compulsion with reference to the methods which the employer shall adopt; and the state insurance commissioner has authority to determine the adequacy and to regulate the compensation rates of the private companies.²³

The State Accident Fund is a creature of the act.²⁴ Full permission is given to the commission to establish this fund by the underwriting of insurance policies under the act. The Maryland fund is in the nature of a straight insurance scheme as contrasted with the compulsory, state-administered mutual insurance fund of the Ohio act. The rules for its administration, and its actual administration, are based upon the experience and organization of private in-

²¹ Secs. 14 and 15.

²² Secs. 15, 29, and 30.

²³ Sec. 15, as amended by Laws 1916, Ch. 597; and Sec. 29.

²⁴ See Secs. 16-28, as amended in 1916.

surance companies. Full power to make rates and classifications conducive to accident prevention is granted. Penal provisions allow the state fund to enforce certain regulations as to uniform payrolls or payroll reports which the private companies enforce by cancellation. As practically conducted, the fund does not solicit policies; and it has thus been able to quote rates on the eight or nine hundred policies which it had underwritten at the end of 1916 ten to thirty per cent lower than the private companies. This saving is also due, in part, to the fact that for the first three years the full cost of administration is borne by the State; and, even after the first three years, the fund is only to bear that part of the expense which is proportionate to its share of the policies written in the State.⁸⁵ It is, of course, impossible to give prior to the lapse of a period of five or possibly ten years an opinion of any value on the efficiency or economy of the state fund. A principal objection to such a fund is that, being unable to refuse any policy, it is overburdened with bad risks. Another objection is that the reserve is generally insufficient to cover catastrophe risk, though in Maryland, it would seem, the entire resources of the State are behind the fund.⁸⁶ Both of these as affecting the possibility of the passing of payments are of utmost importance to the employee, more so perhaps than to the employer.

The objections to the Maryland fund, it is obvious, are due to the fact that it is elective and in competition with the private companies. This fact has led other States, notably Ohio and Washington, to create a monopoly of insurance in the state fund. The savings in administration would seem a convincing argument for this mode of security, if efficient administrative officers could be procured for the state fund and the fund in its entirety could be kept out of politics. This, of course, is socialistic legislation, and encounters the opposition that is the natural concomitant

⁸⁵ See Sec. 27, as amended by Laws 1916, Ch. 597.

⁸⁶ Sec. 16, as amended by Laws 1916, Ch. 597.

of all socialistic enterprises. In Maryland, especially, this opposition would be strong and effective because of the great growth of Baltimore as a center of casualty insurance companies and the consequent disruption of business which would of necessity ensue.

The law as a whole is administered by the State Industrial Accident Commission, composed of three commissioners appointed by the governor of the State for a term of six years with an annual salary of five thousand dollars.²⁷ Provision is made that this commission shall be bi-partisan, but there is no attempt to secure efficient administration at the cost of party politics. The commission has the employment of upwards of fifty clerks, actuaries, etc., with no supervision except the written approval of the governor to the salaries: competitive examinations are not mentioned. During the administration of each governor the terms of at least two of the three commissioners will expire so that each governor will be able to change completely the political complexion of a board which will annually spend forty thousand dollars or over. Whether party politics is going to spoil another good legislative endeavor, it is, of course, impossible to prophesy; but it seems unpardonable that a more efficient check than public opinion was not provided in the law.

The principal, and, at this time,²⁸ the only, office of the commission is in Baltimore City; but, when it is more convenient for one of the commissioners to go into another part of the State to hold a hearing than it is for the claimant with all his witnesses to travel to Baltimore, advantage is taken of the provision allowing one commissioner to hold hearings and make awards subject to the approval of his

²⁷ Secs. 1 and 3. Three thousand dollars only of the salary is paid by the State, because of the provision of the Constitution against appointive officers with salaries above three thousand dollars (Art. 15, Sec. 1). The other two thousand dollars is paid by the City of Baltimore, a practice which has been recently approved by the Court of Appeals with regard to the Public Service Commission in *Thrift v. Laird*, 125 Md. 55.

²⁸ 1916.

colleagues. The normal course of proceedings, however, is for the entire inquiry to be conducted at the home office by the commission as a whole. When due notice has been given of an accident and the fourteen waiting days have passed, during which time the injured laborer has been enjoying medical treatment, the commission sets a date five days in advance, before which any objection to the payment of the claim must be made and a hearing requested. Unless there is objection the claim is paid, for there is specifically declared to be a strong presumption that "the claim comes within the provisions of the act, that sufficient notice was given, that the injury was not occasioned by the wilful intention of the injured employee to bring about the death or injury of himself or another, and that the injury did not result solely from the intoxication of the injured employee while on duty."³⁹ It is in these summary cases naturally that the principal economies of the law become apparent.

If the employer demurs to the employees' claim, a hearing is set. The hearing is held either before the Accident Commission or before a special arbitration committee appointed by it.⁴⁰ Until a large body of precedents is built up it is not expected that a special arbitration committee will be often appointed. At these hearings the commission prefers to have each party represented by an attorney, so that the case will be presented in an orderly manner. Here becomes apparent one of the points where, in the practical operation of a compensation law, it departs radically from its ideals of no lawyers and no hostility between capital and labor. The proceedings of the commission are, however, most summary in their nature. There is no pleading; common law rules of evidence do not prevail.⁴¹ Only one of the present commissioners is a lawyer, and the commissioners often question the witness in order to bring out what

³⁹ Sec. 62.

⁴⁰ Sec. 40.

⁴¹ Secs. 9-10.

seem to them essential points. The proceedings should be equitable rather than legal in nature has declared a Massachusetts court in a recent decision.⁴² In all investigations the commission has "power to issue subpoenas, compel the attendance of witnesses, . . . compel the production of pertinent books, payrolls, accounts, papers, records, documents and testimony," and an immunity bath is provided against self-incrimination to save the constitutionality of the statute.⁴³ Every precaution is taken to secure swift and adequate justice and to make this board, though quasi-judicial in its procedure, executive in its action. The powers of the commission do not cease upon each award, but continue like the powers of equity courts over their trustees and guardians: it may at any time upon due cause and notice amend its awards and decisions.⁴⁴

"Any employer, employee, beneficiary or person feeling aggrieved by any decision of the commission affecting his interests under this Act may have the same reviewed by a proceeding in the nature of an appeal" in any common law court having jurisdiction; "and the court shall determine whether the commission has justly considered all the facts concerning the injury, whether it has exceeded the powers granted it by the Act, or whether it has misconstrued the law and facts applicable in the case decided." This appeal also is to be conducted in a summary manner, but, upon motion of either party, any question of fact involved may be submitted to a jury. Appeals from these proceedings lie to the Court of Appeals.⁴⁵

This exposition of the principles of the act demonstrates that it is a piece of legislation passed for the benefit of the laborer; and, insufficient and unsatisfactory as some of its

⁴² *In re Mut. Liability Ins. Co.*, 102 N. E. 693.

⁴³ Sec. 7. Contempt of any of these orders may be punished upon application to any judge in Maryland.

⁴⁴ Sec. 54. Construed in *Adleman v. Ocean Accident, etc. Corp.*, 130 Md. 512.

⁴⁵ Sec. 56. See also *Breuner v. Breuner*, 127 Md. 189; *Frazier v. Leas*, 127 Md. 572.

provisions have been found to be, it brings about a great improvement over previous conditions. Besides its effect as social legislation, however, certain legal results follow from its enactment.

The Constitutionality of the Law.—From the legal standpoint, the most interesting feature of a compensation law is its constitutionality. Frankly considered, the law requires that the money of one set of people shall be handed over irrespective of fault to the members of another class upon the happening of a contingency. Such a law is a new departure in American legislation and presents some extremely interesting constitutional questions. Numerous arguments, brilliant and intricate, have been published in support of the constitutionality of the law, so that here there is need only of a mere outline of the difficulties.

The fact that the compensation law substitutes vicarious liability without reference to fault for the old common law liability is thus met: "Our jurisprudence affords many examples of legal liability without fault and the deprivation of property without fault being attributable to its owner. The law of deodands was such an example. . . . Other examples are afforded in the liability of the husband for the torts of his wife—the liability of a master for the acts of his servants."⁴⁶ Statutes furnish further examples. Municipalities have been made responsible for property destroyed by a mob;⁴⁷ railroads have been made liable for damage caused by sparks from its engines.⁴⁸ But these precedents are not precedents for the compensation law. The common law instances cited are merely the result of imputing to one the fault of another whose action he controls, and the statutes relate to special objects of state activity. Compensation laws, on the other hand, make an innocent employer carrying on a private, lawful business liable even for an accident occurring in the course of that business. This

⁴⁶ Chicago, R. I. & R. R. Co. v. Zernicke, 183 U. S. 582.

⁴⁷ Chicago v. Sturgis, 222 U. S. 313.

⁴⁸ St. Louis, S. F. R. Co. v. Mathews, 165 U. S. 1, and numerous state decisions.

argument through precedents does not lead to very satisfactory conclusions.

Another argument seeks to uphold the compensation law upon the basis of the decision in the Second Employers' Liability case.⁴⁹ This decision held that it was within the power of Congress so to change the rules of law that no railroad could avail itself of the three common law defences of assumption of risk, contributory negligence, and fellow-servant doctrine in a damage suit against it by an employee. The decision merely reiterated the old opinion that there can be no property in a rule of law.⁵⁰ To try to base the constitutionality of the compensation law upon this decision displays an ignorance of the distinction between that law and an employers' liability law. The liability law merely abrogates the three common law defences and leaves the law of industrial accidents otherwise the same; the compensation law provides for the indiscriminate indemnification by an administrative tribunal of all industrial accidents. The liability law retains the idea of fault; the compensation law imposes a vicarious liability.

A final case relied upon—and this time with more justification—is the bank guarantee case.⁵¹ Here the court held constitutional a law which ordered all state banks in the State of Oklahoma to contribute to a guarantee fund from which were to be paid the losses sustained by the depositors in any state bank by its insolvency. Here property is taken from one set of people to be handed over to another set upon the happening of a contingency for which the first set is often without fault. In this respect this law is exactly similar to a compensation law, and this case, especially in view of the broad language used by Justice Holmes, is most aptly referred to as a precedent and an analogue in arguing the constitutionality of a compensation law. But a distinction can be drawn. In the first place, banking is

⁴⁹ *Mundou v. N. Y., N. H. & H. R. Co.*, 223 U. S. 1.

⁵⁰ *Munn v. Illinois*, 94 U. S. 113.

⁵¹ *Noble State Bank v. Haskell*, 219 U. S. 104.

peculiarly a subject of state control; it is most highly "affected with a public interest." In fact, it is really a public business entrusted to private enterprise and almost any regulation in furtherance of the public welfare would be justified. In the second place, there is a decided community of interest among bankers which tends to make them stand together and be somewhat responsible for the acts of one another, so that the law merely lends the sanction of the state to what was before demanded by self-interest. It might be argued that a compensation law creates a community of interest among employers in the promotion of safety, but this is a difficult argument, and there is of course no special public interest in most of the occupations covered by a compensation law. Therefore, though the bank guarantee case is a weighty precedent, it does not seem to be absolutely conclusive.

If a compulsory compensation law is to be frankly upheld, it will have to be upheld as an exercise of the police power. It was in the exercise of this power that the Maryland act was avowedly passed.⁵² "Property of every kind—it must be remembered—is held subject to those regulations which are necessary for the common good and general welfare. And the legislature has the power to define the mode and manner in which every one may use his property."⁵³ It is in pursuance of this power, as was said in the first chapter, that all labor legislation is enacted and, if we consider the previous, admittedly constitutional labor enactments, it will be easily demonstrated that the compensation law is merely a peculiar development of a well-established principle.

Since the Industrial Revolution, the bargaining power of the laborer has not been equal to that of the employer. The inequality was early recognized by the legislatures and

⁵² See the preamble, Part 4.

⁵³ *Windsor v. State*, 103 Md. 611, quoting *Story on the Constitution*. See also *Singer v. State*, 72 Md. 464; *State v. Hyman*, 98 Md. 596; 64 L. R. A. 637; *State v. Gurry*, 121 Md. 534; *C. & P. Telephone Co. v. Board of Forestry*, 125 Md. 666.

the courts too have now explicitly sanctioned the legislative correction of this inequality.⁵⁴ In pursuance of this policy of equalization, the legislatures have never seen fit to make absolutely equal the two parties to the labor contract, but have instead guaranteed to the employee certain terms of the contract which were conceived as necessary to the "general welfare and public convenience." Thus the legislature has passed child labor laws, hours of labor laws for men and women, safety and sanitation laws, and a host of other laws which are not so easy of classification. The compensation law is a law of this kind. Conceiving that the employee could not successfully bargain with the employer for a sufficient insurance to himself against industrial accidents, the legislature by its fiat introduced such an insurance term into every labor contract. That is to say, the law recognized that, as economists had long contended, the employee did not visualize all the risks of his employment, as the common law assumed he did, and demand a higher wage in consequence thereof. Therefore, says the law, an implied term of every contract shall be an adequate compensation in case of industrial accident.

That this term of the contract is as necessary to the general welfare as are the terms introduced by previous laws seems hardly to require detailed proof. Industrial accidents are undoubtedly the principal causes of poverty and degradation. If the prevention of poverty is not necessary to the general welfare of a community, what is? It is true that the courts, not however without criticism, have refused to sanction taxation for the prevention of poverty. But, granting the correctness of these decisions, they do not weaken our argument. By a compensation law the State does not tax for the prevention of destitution; it merely decrees that industry shall not prosper from the mishaps of the employee, just as it formerly declared that industry should not prosper from the labor of children. Industry must be conducted legitimately and it is certainly within

⁵⁴ Holden v. Hardy, 169 U. S. 366.

the power of the State to decree that industry shall bear the cost of all its materials, the cost of the life and limbs of its laborers, as well as of the inanimate equipment and raw stuffs.

In thus briefly outlining the constitutional difficulties which accompany a compensation law, it is of course impossible to consider the finer points of law. Equally impossible is it to examine some minor constitutional questions which may be raised with regard to the Maryland law, but which are not essential to the compensation principle.

From the practical legal standpoint, the most important result of the compensation law will be to render obsolete in the occupations covered all the intricate tort law dealing with the relation between employer and employee.⁵⁵ As has been so often iterated, the employer can no longer plead contributory negligence, the doctrine of assumption of risk, and the fellow servant doctrine in defense of a claim against him by an employee. The law of contributory negligence will continue to exist in other damage suits, but with this exception these doctrines will ultimately pass out of existence. With them will pass a mass of complicated and unsettled law. No longer will there be a question of what risks the employee assumes on entering an employment, of what kinds of instruments the employer must furnish, whether a defect in a machine is latent or patent, or whether the employer has engaged efficient fellow servants to work with the employee. No longer, in short, will it be necessary to enumerate the duties of the employer to the employee, for they will all become merged in one duty,—to compensate him for an industrial accident. No longer again will it be necessary to determine who are fellow servants, for the doctrine relating to them is also abolished. By an amendment of 1916 one of the elaborations of this rule is explicitly abrogated. If an employee of a subcontractor is injured he may collect his compensation directly

⁵⁵ See Harlan, *Domestic Relations*, Part V.

from the contractor in chief, who will then contest with the subcontractor the ultimate liability.⁵⁶ Thus, so far as the workingman is concerned, the doctrine of independent contractor and with it the doctrine of vice-principal is abolished.

In place of this branch of the law there is growing up a new series of cases deciding what is an accidental injury "arising out of" and "in the course of employment." This line of cases, if we can judge from present indications, threatens to become as long as those which have been overthrown by the act; but they will hardly result in such difficult law. I have already quoted the definition adopted by the Maryland Accident Commission.

Finally a change must be noted in the relation of the employee to the insurance carrier. Under the common law the insurance carrier bears no special relation to the employee; it was merely the indemnifier of the employer. Under the compensation law "the insurance carrier occupies the position of surety for the employer, to secure the fulfillment of any liability which may be determined to have arisen."⁵⁷ The liability of the carrier to the employee is a primary liability jointly with the employer, and it is not excused from payment of the compensation by the bankruptcy or insolvency of the employer.⁵⁸ Nor, of course, on the other hand is the employer relieved by insuring in a bankrupt or insolvent insurance carrier.

⁵⁶ Laws 1916, Ch. 597, adding Sec. 60A to the Code.

⁵⁷ *Brenner v. Brenner*, 127 Md. 189.

⁵⁸ Code 1914, Art. 101, Sec. 36.

CHAPTER IV

THE CONDITIONS OF EMPLOYMENT

The enactments of the state regulating the conditions of employment of the workingman, the safety and sanitation laws, are the most important features of a constructive labor legislation program. True, the activity of the state in the fields discussed in the two preceding chapters is most essential to the welfare of the laborer, but the statutes relating to the labor union and the compensation law are for the most part amendatory of the common law. Such interference of the state in labor matters was directed to making more efficient the existing means for the reform of labor conditions, that is, to the development of the union and to the modernizing of the common law to fit present day industrial conditions; the remainder of this study will be concerned with the extent to which the state should intervene in private affairs in the attempt to ameliorate labor conditions.

The most important matter with regard to which the state exercises its power of intervention is the regulation of the environment in which the laborer conducts his daily task. This dogmatic statement might be strenuously contested by some labor reform advocates and by some economists, but their position seems to be much weakened by an unproportioned estimate of present conditions and future possibilities. The contention that the foremost problems and concerns of labor are unemployment, wages and hours may be admitted without disproving the contention that the prime object of state activity is the safeguarding of the employee in his daily work. Not only historically was this the first concern of the state in industrial conditions, but practically it affects more intimately and more uniformly

the whole mass of workingmen. State employment officers may find work for a part of the unemployed who rarely comprise more than eight per cent of the working class; the state may set a minimum wage for the hopelessly weak bargainers; and the state may regulate hours in the extremely overworked trades; but, in all these, the great majority of the workers are working out their own salvation with constantly increasing success. Safety and sanitary legislation, on the other hand, affects every laborer. The unit of reform, so to speak, is the factory, not the individual; and it is this distinction which brings these factory laws peculiarly within the function of the state and takes them out of the scope of private and voluntary means of reform.

It is hardly necessary at this late date to argue that safety and sanitation legislation is proper in the present status of industrial conditions. Not even the most extreme adherent of laissez-faire can deny that competition and the absence of regulation reduce the conditions of labor below the standards of decency and good health. Even the most extreme individualists admit that the police power of the state extends to the reasonable regulation of working conditions. Only the opposition of the capitalist, who naturally objects to the expenditure of his money for the benefit of others, and that without any easily perceptible advantage to himself, deters the legislators from enacting the fine, ideal laws which have been drafted for them.

Regulation by Commission.—There is, however, some dispute with reference to the preferable mode of regulation if not to the necessity and kind of regulation. Until five years ago all safety and sanitary laws, if complete, were lengthy, minute enactments covering every known condition of employment and laying down absolute laws to apply to every preconceived condition. Set screws, unguarded belts, and other dangerous devices were absolutely outlawed, but there the law stopped. In 1911 Wisconsin,¹ drawing a les-

¹ Wisconsin Laws, Secs. 2394-41 to 2394-71.

son from the evolution of the governmental control of rates, applied the commission idea of regulation to industrial conditions. A general law providing for safety in industrial occupations was enacted and a commission with ordinance powers was appointed to issue orders in compliance with this general law. Full discretionary powers are substituted for absolute and arbitrary regulation. Finding it impossible to foresee every possible contingency in which the labor law would be applied and conceiving it equally impossible to leave anything to the easily corrupted discretion of the inspectors, the legislature created a competent and responsible board to carry out its wishes. The idea of this fourth branch of government, the administrative branch, as it is sometimes called,² is not new in American politics. The federal government has found it advisable in handling interstate commercial and industrial conditions and the State governments have rather generally adopted the same means of controlling their public service corporations and of administering their workmen's compensation laws. In the field of labor legislation the experiment of Wisconsin has not failed to stimulate imitation; both Massachusetts and New York among the Eastern States having to a considerable degree adopted this means of regulation.

From the legal standpoint the commission is an investigating agency with, it is true, considerably more power to secure practical benefits from its investigations than have most investigating committees. The significance of this aspect of the commission's work is most obvious. As has been said, the regulation of the environment of employment is easily within the police power of the state—the protection of health and safety is the most elemental exercise of this power. The only limitation upon this control is that it must be reasonable both in the manner of its appli-

² Most of this discussion of the industrial commission scheme of government has been suggested by an article by J. R. Commons, published by the Wisconsin Industrial Commission, most of which appeared in *The Survey* for January 4, 1913.

cation and in the discrimination necessarily involved in its exercise. Because of the manner in which the commission formulates its rules, its ordinances have the *prima facie* weight of reasonableness greater than in the case of legislative enactments.

The commission is assisted in drawing up its orders by unpaid, advisory subcommittees on the various subjects of safety and sanitation. These subcommittees are not composed of experts fixing ideal regulations, which, as Mr. Commons says, may be reasonable in a superregulated country like Germany, but hardly in the United States; they are where possible drawn mainly from the ranks of the employers and employees, with occasionally one or two experts who are usually taken from state boards or insurance companies. These subcommittees deliberate, hear witnesses in the same manner as legislative committees, and draw up rules which are referred to the commission as "general orders." These orders are published and then considered at hearings held before the commission. If amendments are suggested to the commission at these hearings and approved by them the report of the advisors is recommitted to them. When finally approved by the commission, the "general orders" are enacted to go into effect thirty days after final publication. The orders can, of course, be attacked in court; but, as the commission has sat at its hearings in its judicial capacity its findings are presumed to be reasonable and constitutional, and even if before the court new evidence is unearthed to prove the unreasonableness of the order the order is referred back to the commission for a rehearing; the court does not absolutely annul the order. Moreover, since these orders are adopted by a body composed largely of employers, little ground is afforded for the objection of arbitrariness and public opinion has a strong lever against the recalcitrant capitalist.

Moreover, through its power to enforce the factory law, to control inspection and to enact "special orders" to fit unforeseen contingencies, the commission is enabled to ad-

minister the law more efficiently and some would be tempted to say more humanely than it otherwise could. As the commission itself characterizes this part of its work, "the work of the inspectors of the commission is *not* to ferret out points of danger and to tabulate them, but it is chiefly to do *constructive educational work*. . . . The one point which the commissioners most strongly emphasize with the deputies is that they must so present safety work that the employers will become interested and will appreciate its practical value from the standpoint of efficiency."⁸ The field agents of the commission are "deputies," not "inspectors." They confer with each employer and if there is an exceptional situation in his plant, a "special order" is obtained from the commission to prevent any irritation from the operation of the general orders. The same principles underlie the educational work of the commission among the employees, for it is well recognized that safety results quite as much from the improved esprit de corps of the workers as from mechanical safety devices.

In short, everything reasonable is done to decrease the enormous loss of life and limb which had come to be considered a natural concomitant of modern industry. "Reasonableness" may be said to be the watchword of the commission. The effect of its policy has been to reduce irritation and to keep the factory law out of the courts. It seems beyond doubt that this plan of legislation will be held constitutional, for the courts have recognized this fourth branch of government in other fields; and once the legality of the fundamental law is established there can hardly be further dispute with reference to an order enacted as these orders are. Moreover, the new status of the inspection department will keep most cases out of court, for it is human nature to respond more readily to solicitous appeals than to threatening commands. In fact, it has been found in Wisconsin that once an intelligent employer has been shown

⁸ Report of the Wisconsin Industrial Commission on Allied Functions for the Two Years Ending June 30, 1914, p. 9.

the most evident deficiencies of his establishment, his own sense of justice will often prompt him to undertake a thorough rehabilitation of his plant.

In Maryland, however, this scheme has not obtained any considerable foothold, and, though it is instructive to examine it in a purely disinterested spirit as a more efficient system to which we are inevitably tending, yet such a study does not take us far in the investigation of the existing laws. Maryland, however, is woefully deficient in its factory legislation; and, even in studying the existing laws, this chapter will be as often a consideration of ideals as of actual facts.

Fire Protection.—The fire hazard can without doubt be said to be the most important safety problem demanding solution by the State at the present day. Yet practically every State, unless it has adopted a new building code, within the last few years has taken decidedly inadequate measures to meet the danger. Maryland is no exception. Despite the general agreement that "an ounce of prevention is worth a pound of cure," the legislature of Maryland allows every city and county within its bounds to expend thousands in maintaining an elaborate fire department and, with the exception of the City of Baltimore, provides no fire prevention law. Even in Baltimore the laws and ordinances aimed at the prevention of fire are not at all in proportion to the hazard. It needs a tragedy to arouse the American public to action and, because as yet there has been no holocaust in Baltimore, we are content to await one before enacting the proper laws.

Practically the entire fire law of Baltimore and, in considering this subject, Baltimore will take the place of Maryland as the unit of discussion since the fire hazard has been considered important enough for legislation only in this city—practically the entire fire law of Baltimore is in the hands of the building inspector. Now, at the beginning of this chapter, the excellencies of an elastic law were extolled; but the fire law is one wherein certain fundamental

maxims and orders can be laid down with precision, and have been laid down in states where legislation has been carefully enacted, as in New York. Moreover, when the law is elastic it should be administered by a competent commission under some pressure to enact orders and not by the arbitrary will of one political appointee to office. Of the fire laws affecting places of labor which do not depend upon the discretion of the inspector, one forbids the "proprietor of any sweatshop or factory where four or more persons are employed to use any coal oil, gasoline, etc. . . . for the purpose of lighting or heating in any form."⁴ Not only is this the only absolute provision of the fire law, but, as far as I can discover, it is the only provision looking to fire prevention and not to fire escape. Another law does in a way provide a barrier against fire in decreeing the fireproof construction of the first floor of buildings to be built after 1906;⁵ but this fire prevention is in the nature of a protection to the physical structure of the workshop and not to the lives of the workers, for experience has demonstrated that, as far as human life is concerned, fireproof buildings are as dangerous to those in the buildings as non-fireproof structures.

These two laws also provide for a means of escape; and in this respect are of value, but being incomplete these provisions are less important than those which have just been considered. In the latter law it is ordered that, in all new buildings, "the entire stairway shall be built of fireproof material," but as the best fire escape is often useless if it is open to the inroads of smoke and flame, the omission to provide for a fireproof enclosure around the escape robs this portion of the law of most of its value. The earlier law commands fire escapes in sweatshops or factories "where four or more persons are employed as garment workers on other than the first floor" of the building. The qualification of garment worker is, of course, pernicious;

⁴ Laws 1898, Ch. 123; Baltimore City Code 1906, Art. 4, Sec. 280.

⁵ Baltimore City Code 1906, Art. 3, Sec. 82.

and it is alleged that this provision of the building code is further weakened by the arbitrary interpretation of the word fire escape by the building inspector whose requirements are met by one unenclosed fireproof staircase or even by two wooden staircases in separate parts of the building.⁶

The other laws enforced by the building inspector are even more lax and inefficient, and they are to a certain degree overlapping and confusing. One provides that "all manufactories employing twenty-five or more persons . . . [shall] have the proper means of exit in case of fire or panic" in the discretion of the inspector of buildings.⁷ An ordinance of the mayor and City Council of Baltimore makes the same stipulation for buildings in which five or more are employed;⁸ and a final provision decrees that any building "in which operatives are employed in any of the stories above the first story shall be provided with such fire escapes, alarms and doors as shall be directed and approved by the inspector of buildings."⁹ This official has issued few orders of any importance.

The whole situation is unsatisfactory. The fire code is incomplete and far below the requirements of a modern industrial city. It is true that there has been no astounding loss of life in any fire in Baltimore, but this must be due more to individual endeavor than to State supervision; and, moreover, the per capita monetary loss in Baltimore is still oppressively high as compared with European cities and the foremost American cities. A systematic revision of the fire law should be undertaken. In this respect Baltimore might profit by the experience of New York. After the terrible Triangle Waist fire, New York with the aid of the Factory Investigating Commission devised and to a great degree enacted a complete system of fire laws.¹⁰ This system,

⁶ Miss Anna Herkner, then Assistant Chief of Maryland Bureau of Statistics, is the authority for this statement. See also report of this Bureau for 1912, p. 75.

⁷ Baltimore City Code 1906, Art. 3, Sec. 80.

⁸ Ordinances 1908-1909, No. 155, Sec. 3, Par. 6.

⁹ Baltimore City Code 1906, Art. 3, Sec. 83.

¹⁰ See New York Senate Documents 1913, vol. 13, no. 36, pt. 1, pp. 53-89; and New York Consolidated Laws, Ch. 31, Secs. 79-83.

though in its details entirely too stringent for the necessities of Baltimore, might well be adopted in its fundamentals in this city. As a prevention against fire, cleanliness and carefulness are the two essentials. Fireproof receptacles should, therefore, be required for all inflammable waste and rubbish, and these receptacles should be emptied at least once a day. Gas jets in factories should be enclosed by globes or otherwise protected and all smoking in factories should be prohibited under penalty. Furthermore, to check incipient fires automatic sprinklers should be installed. These, the New York commission says, are absolutely necessary above the seventh floor on account of the limitations of the fire fighting apparatus, but these limitations do not trouble us much in Baltimore for the simple reason that few of our factories are over six stories in height. For the benefit of the factory owner, it may be said that these sprinklers have proved their worth in from seventy-five to ninety-five per cent of the cases in which they have been tested by actual conditions, and that, moreover, they pay for themselves in reduced insurance rates.

For the protection of those caught within the building by a fire the commission formulated minute and elaborate rules. A fire alarm system, for which in Maryland there is an inadequate provision, and regularly conducted fire drills participated in by all the occupants of the building are conceived as a prime essential to avert panics. Unhampered and quick access to the exits on the various floors is also a desideratum which is so often sacrificed to the demands for space. For the fire escapes themselves elaborate rules are laid down. In the first place, outside escapes are uniformly discouraged. These escapes are practically of little use, for the inmates are not accustomed to use them; and if in a panic a few find them these few are often too bewildered to use them efficiently. Moreover, in winter the outside escapes are often slippery, and the smoke and flames pouring out of a window opening on them render them entirely useless. The most efficient escapes are horizontal

exits through a fire wall traversing the whole length of the building from ground to roof. This divides the structure into two fireproof compartments and, it is perfectly obvious, furnishes an ideal means of escape. If this is impracticable the same end may be attained by the cooperative use by two buildings of the party wall. An enclosed fireproof staircase within or attached to the building is another approved method of escape and if large enough, this staircase is perfectly efficient. The New York building code furnishes minute regulations as to the relation of the number of occupants to the width of the various kinds of fire escapes, but what has been said is sufficient to show the magnitude of the improvement possible and necessary in Maryland.

Protective Devices.—In its provisions for the safeguarding of dangerous machines the Maryland labor law is, if anything, more deficient than its provisions against fire. There are a few laws decreeing the inspection of scaffolding¹¹ and boilers¹² with provisions for their safety, but that is about all. There are, it is true, some general provisions on the statute books, but these, though they might be most prolific and efficient, are for the most part entirely abortive. Thus in the compensation law¹³ reference is made to the power of the Accident Commission to order safety devices in the factories; but as yet this power has not been exercised, and even if it were, the exercise would possibly be unconstitutional because of the lack of notice in the title of the act. Again, the building inspector has the power to compel the repair or reconstruction of parts of buildings which "endanger the safety of their occupants,"¹⁴ and under his power to issue permits for electrical machines¹⁵ he may compel the use of safety devices; but these provisions have been bootless. These deficiencies in Maryland are especially

¹¹ Code 1911, Art. 48, Secs. 75-79.

¹² Baltimore City Charter 1915, Secs. 572-589.

¹³ Laws 1914, Ch. 800, Sec. 54. Code 1914, Art. 101, Sec. 55.

¹⁴ Baltimore City Ordinances 1908-1909, No. 155, Sec. 3, Par. 7.

¹⁵ Baltimore City Code 1906, Ords. Art. 3, Sec. 45.

glaring when it is remembered that Wisconsin and Massachusetts by means of orders from their industrial commissions and New York by means of legislative enactments and orders have formulated an elaborate system of safety regulations for the benefit of their working people.

Under the head of safety devices, though here the personal rather than the material element is concerned, may be mentioned the full-crew railroad law.¹⁶ This, however, the railroads have demonstrated to be not a valid safety measure, but a mere sop to the unions.

Requiring the same brief mention, but actually of much more importance, are the safety and inspection provisions for mines in Alleghany and Garrett counties.¹⁷ These are minute and technical provisions, an extended discussion of which would hardly lend interest to this study. The details are most technical and quite beyond the comprehension of a layman. Suffice it to say that the coal mines of Maryland are considered as safe as any in the country, but whether that is because of these enactments or because of the inherent nature of the mines would require an investigation quite beyond the scope of this monograph.

Sanitation.—In the field of sanitary legislation the statute book of Maryland until the legislative session of 1914 was equally deficient. In that year special laws regulating tenement houses and food-producing establishments set rather high standards in those particular fields, but left the general law totally inadequate. There was prior to 1914 a general law providing that "all factories, etc. . . . in this State shall be kept in a cleanly condition and free from effluvia arising from any drain, privy or other nuisance; and no factory, manufacturing establishment or workshop shall be so overcrowded while work is carried on therein as to be injurious to the health of the persons employed therein, and every such factory, etc., shall be well and sufficiently

¹⁶ Code 1911, Art. 23, Secs. 331-335.

¹⁷ Code Public Local Laws 1888, Art. 1, Secs. 207-209; Art. 12, Sec. 161-164.

lighted and ventilated in such manner as to render harmless, as far as practical, all gases, etc., generated in the course of the process . . . carried on therein, which may be injurious to health";¹⁸ but the Bureau of Industrial Statistics and Inspection to which by means of a court proceeding was entrusted the enforcement of this law found it absolutely impracticable because of the generality of its provisions. It was impossible to convict in any court of justice: an essential of a criminal statute is definiteness. The legislature in 1914 repealed this law, and substituted therefor a law requiring the licensing of all places manufacturing "articles of clothing, hats, gloves, furs, feathers, artificial flowers, purses, cigars or cigarettes."¹⁹ The only condition precedent to the grant of this license is the necessity of a minimum of five hundred cubic feet of air space for every person employed—a necessary provision, but not of highly practical value—and the compliance with the existing laws and ordinances applying to these workshops. The real purpose of this law as acknowledged by its sponsors, the industrial bureau, was not to effect an improvement of labor conditions, but to show matters in their true light, to expose the real status of factory regulation, to relieve the Board of Labor of the responsibility of enforcing a practically nonexistent law and to shift this responsibility to the city officials who have the real means of coercion.

This law, it is obvious, is merely an additional means of enforcing the general laws of the State in these specified industries. There is, however, no general enactment in Maryland applying throughout the State; the nearest approach to a general sanitary provision is an ordinance of Baltimore City decreeing separate toilets for the sexes to be kept "in a cleanly and safe condition."²⁰ Therefore, if an industry is not located in a dwelling or tenement house, if it is not engaged in manufacturing food products, and

¹⁸ Laws 1884, Ch. 265. Code 1904, Art. 27, Sec. 243.

¹⁹ Laws 1914, Ch. 779, Sec. 246.

²⁰ Baltimore City Code 1906, Art. 14, Sec. 158.

if it is not in Baltimore City, it has to comply with absolutely no sanitary regulations, and, indeed, in these non-regulated industries the sanitary condition has been found to be very poor. No provision is made for the cleanliness of factories, an essential to good health as well as to fire protection. No provision is made for ventilation, a matter which is the subject of numerous administrative orders in other States. Not only is the ventilation of factories left to private enterprise, but the slight provision that there is for toilets does not provide for their ventilation and factory toilets are very generally ventilated through the work rooms of the factory. Only in Carroll County²¹ is there any provision for a forced ventilation by suction fans to preserve the workers from lung diseases brought on by inhaling dust and noxious gases. To be entirely fair, the law requiring the sprinkling of the floors of shirt factories every morning²² should be mentioned here, but the relief is so slight and the method is so antiquated that this narrowly limited law cannot greatly mitigate the indictment of Maryland. Finally, if we omit consideration of minor requirements, there is in Maryland no law looking to the proper lighting of factories; and the employer is at full liberty to strain the eyesight of his workers to the point of exhaustion. Although I have not made a thorough investigation at first hand, some of the actual conditions described I have myself observed; and if some first hand investigator seeks to extenuate these failings of the Maryland law by maintaining that actual conditions demonstrate on the whole that Maryland does not as yet need regulatory laws, I would answer that it is always easier to prohibit by legislation things which are not in existence and which do not represent as yet any vested right. Inasmuch, moreover, as other States have had to cope with these evils, now is the time for Maryland to legislate.

In decided contrast to this inefficient phase of the law is

²¹ Laws 1894, Ch. 202. Applies only to stone-grinding mills.

²² Code 1911, Art. 43, Sec. 102.

the recently enacted sanitary inspection law.²³ The act makes minute provision for the regulation of every place in which "food products are manufactured, packed, stored, deposited, collected, prepared, produced or sold."²⁴ In addition there is vested in the State Board of Health, which is entrusted with the administration of the law, full power to promulgate, "from time to time, . . . such general rules and regulations . . . for the government of the inspectors and employees of the board as may be necessary," provided it gives due notice of these orders with the opportunity of a hearing for those concerned.²⁵ Since the administration of the law is vested in the Board of Health, its purpose is plainly to protect the health of the community rather than to benefit the workers, but, nevertheless, improved surroundings cannot but accrue to the advantage of the employees. In so far, however, as the Board of Health considers this law a pure health measure, its orders will be and in fact have been much less in behalf of the laborers than if the administration had been vested in the labor department.

The specific provisions for the sanitary norms to be applied to the various food factories are almost ideal in their nature.²⁶ It is first enacted that all of the rooms, furniture and implements used in the preparation of food products shall be kept in "a clean and sanitary condition," unclean and unsanitary meaning the lack of protection of the food itself against flies, filth, etc., the failure to remove all dirt and waste product, and the failure to keep the persons of the employees clean. It might have been provided that the side walls and ceilings should be regularly lime-washed, but in the absence of this stipulation it is to be expected that the Board of Health will issue orders to fill the gap. It is further enacted that "every . . . place occupied . . . for

²³ Laws 1914, Ch. 678.

²⁴ *Ibid.*, Sec. 1.

²⁵ *Ibid.*, Sec. 7.

²⁶ *Ibid.*, Sec. 3, Subsecs. a-f.

the preparation, etc., of food shall have convenient toilet or toilet rooms which shall be kept separate from the rooms where the process of production, etc., is conducted, and all parts of such toilet rooms shall be kept clean." Moreover, the workers are forbidden to sleep in the workroom of a bakeshop, etc., or in the kitchen or dining room of a hotel, restaurant or boarding house; and the employer is forbidden to employ any worker affected with a communicable disease unless he can produce a certificate from the Board of Health permitting him to be employed in such a place. Finally, washrooms are ordered to be constructed in these factories. Further stipulations are laid down for canneries in the State, but these are largely technical and do not add much to the general provisions.

There is only one serious omission from this law: cellar bakeries are not prohibited. It is obvious that "a cellar is unfit both for the manufacture of food stuffs and for the habitation of workers. There can be no natural light under the most favorable conditions in a cellar. They are also very difficult places to ventilate unless a mechanical system is installed, which is out of the question in the ordinary small bakery. . . . They cannot be kept as clean as other parts of the house, for they are semi-dark, and contain most of the plumbing pipes and fixtures. They are also the natural habitation of insects and rodents."²⁷ Although it is true that conditions in Baltimore bakeries are not nearly so bad as they are in New York and, in fact, it has been said that there are no cellar bakeries in this city,²⁸ the absence of the evil, as has been contended in another connection, constitutes no real argument against sound prophylactic legislation.

The Tenement Law.—In 1914, also, Maryland obtained perhaps as efficient a homework or tenement law as is pos-

²⁷ New York Factory Investigation Committee Report, Senate Documents of New York, 1913, vol. 13, no. 36, pt. 1, p. 222.

²⁸ Dr. Caspari of the State Board of Health, who has charge of the administration of this act is the authority for this statement.

sible.²⁹ A tenement inspection law is practically always inadequate because of the impossibility of proper inspection even with the largest corps of well-trained inspectors. A sufficient corps of inspectors may perhaps keep the tenements free from filth and disease, but an absolutely efficient administration of the child labor law or any other law affecting the terms of labor is unattainable. Investigations in New York have shown that children too young to be sent to school were put to work helping the parent and that children of school age were compelled to give help for such unreasonable hours that their school work could hardly be of any practical benefit.³⁰ Moreover, it was argued by some of the witnesses, that in view of the low wages paid tenement workers it could not be denied that some manufacturers were obtaining an unfair advantage in free rent and light at the ultimate cost of the State in broken-down workers; but, pregnant as this contention may be in forcefully presenting some of the evils of home work, it cannot be said to be a potent argument for State interference. If the State determines to regulate hours of labor, wages of labor and child labor, and finds it impossible to do so while tenement work-rooms exist, then, granting that it is within the power of the State to undertake this regulation, the State would have the right to prohibit home work. The health of the community can be safeguarded by adequate or approximately adequate inspection of the conditions of employment, and that is the subject of this chapter.

The act provides for the registration of every factory, workshop, or mercantile establishment employing five or more people;³¹ and every room or part of a tenement house which is to be used for manufacture or repair work, except, of course, the personal work of the occupants, must first be licensed by the State Board of Labor and Statistics.³² In

²⁹ Laws 1914, Ch. 779.

³⁰ Conducted by the Factory Investigating Committee.

³¹ Code 1914, Art. 27, Sec. 264, as amended by Laws 1916, Ch. 406.

³² *Ibid.*, Sec. 245.

New York the licensing of the whole tenement as a unit has been found more efficient than the licensing of each workshop separately since it interests the owner of the tenement in the conditions of the separate workshops and makes an additional person responsible for the sanitary conditions. This is perhaps an improvement on the Maryland law, but not of fundamental importance, since, as it is, the manufacturer contracting out to home workers is also compelled to see that the provisions of the act are complied with in the homes to which he sends his work.³³ These administrative features are the strong points of the law, and especially so when coupled with the minimum requirement of one inspection every six months—a minimum, however, much below comparative efficiency, but expedient for the sake of economy.

Although below the most exacting standards, the sanitary provisions of the act, if conscientiously enforced, may raise home work to a satisfactory sanitary level. The Board of Labor and Statistics has powerful means in its hands to enforce these provisions, for much is left to its discretion in granting the licenses and it has power to revoke them upon the slightest infringement of the conditions of their grant.³⁴ The board may refuse the license if the place cannot show a clean health record. If the health record be clean, then an inspection of the place is necessary; and, if the board through its inspectors "ascertain that such room or apartment is free from . . . communicable disease and is in proper sanitary condition, it shall grant a license" for the place to be used by members of the family only, and that only to the number of one worker to every five hundred cubic feet of air space.³⁵ Though the New York commission recommended more stringent sanitary regulations than these, Massachusetts has practically the same provisions as has Maryland. While not ideal, therefore, the Maryland provisions at least may be said to be adequate.

³³ *Ibid.*, Sec. 247.

³⁴ *Ibid.*, Sec. 248.

³⁵ *Ibid.*, Sec. 245.

In actual operation, however, the law is not so satisfactory. The final determination of the sanitary condition has been left in the hands of the local health department, for the board has found it inexpedient to controvert the findings of the health authorities as to health conditions. The effect of this has been that practically no licenses have been refused because of the presence of communicable diseases: the health authorities rarely find any evidence of such diseases or, if any is found, the conditions are soon corrected. It is hardly within the scope of this study to indict the health officials, but the performance of their part in the enforcement of the law has been, to say the least, very desultory.

CHAPTER V

THE TERMS OF EMPLOYMENT

Foreword.—The question of the extent to which the State should interfere with the terms of employment is one of the most acute of modern legislative problems. In general, it may be said that as the State, on the one hand, is in most cases warranted in regulating the conditions of employment, so, on the other hand, in most cases there must be actual and positive cause for the extension of State activity to the control of the terms of employment. In general, the problem of the hours and wages of employment should be solved by the bargaining of the wage-earner and the employer.

The extent to which the State should interfere with the terms of employment is, of course, one of the questions of the science of legislation, and it should be solved according to the norms and maxims of that science. But it is practically impossible for a student of American government to consider legislative problems solely in the light of the principles of legislation. If he could do so, his task would be comparatively simple. An almost religious regard for the law of the Constitution has so imbedded itself in the legal thought of the United States that to think of framing an enactment without scrupulous respect for its constitutionality would be unpardonable sacrilege. It is this which accounts for the obvious and deplorable lack of consistency and scheme in the labor legislation of every State. The grossest inconsistency is apparent in the enactments concerning labor unions and the terms of the contract of employment.

In attempting to outline an ideal and consistent scheme of legislation, I shall attempt to prove in a subsequent chap-

ter that legislation regulating the terms of employment is only justified as a temporary expedient. Labor legislation, as has been so often iterated, is a means of equalizing the bargaining power of labor and capital, but the greatest equalizer, it will be shown, is the union. Until the ideal of complete unionization is attained, State interference with the terms of employment is justified. The courts have upheld legislation in respect to the hours and wages of employment of women and children, but have quite as unanimously overthrown similar legislation for unorganized workingmen unless the occupation is especially dangerous. They have thus established a principle of American legislation, but a principle which is unsound. It seems to be based upon two fundamental conceptions. In the first place, women and children because of their weaker nature have all through the common law been considered just recipients of the protection of the law. The courts have, therefore, always rather welcomed¹ legislation delimiting the employment of women and children. Their antagonism to legislation for adult males, however, is unjustified, for, although the weakness of women and children does entitle them to additional protection from the State against undue influence and fraud, the unorganized male laborer is in as unfair a position in making a wage contract with the average employer as the weakest woman. Mental strength has little effect against a dominating force. In the second place, the courts in upholding labor legislation of this kind put it most often in the rubric of health laws. Of course, it is true that the physical condition of women and children is less resistant than that of men, and, moreover, it is easy to argue that the welfare of the community is more strictly connected with the health of women and children than with that of men. But this is largely a matter of degree and hardly the occasion for such a strict drawing of constitutional lines. A needless inconsistency is the result.

¹ I think that I am justified in the use of this word in view of the decision in *Bosley v. McLoughlin*, 236 U. S. 385.

If to this inconsistency is added the pressure of all kinds of reform organizations for every conceivable limitation of the terms of labor and the cheap politics displayed by candidates competing for the vote of the laboring class, the possibilities of a shapeless system of labor legislation seem of limitless magnitude. This shapelessness has been more than achieved. Instead of the almost total absence of legislation regulating hours and wages of labor which would be the case under ideal conditions, the statutes of the average State are an enervating hodge-podge. Antiquated and useless legislation is left on the books to the confusion of the lawyer and student; conflicting laws are enacted without taking the trouble to repeal the earlier laws; criminal laws without penalties are set forth as sops to some now forgotten reform movement; and high sounding laws with fatal exceptions are in endless abundance. This is a concise and exact description of the legislation of Maryland in spite of some recent efforts of the legislators. There is absolutely no unity or system present. It must not be understood, however, that Maryland is unique in this respect. Except for those States, of which Wisconsin is the foremost example, which have practically repealed all their previous labor law and left to a commission the evolution of a new system, every State of the Union is equally guilty. Even New York, which has recently adopted almost an entire new code of labor legislation has been remiss in failing to repeal the earlier law. But for an estimate of the status of the laborer in Maryland, some study of this phase of the law is necessary. For the purposes of this chapter I have, therefore, arranged the laws under three heads: first, those prohibiting the employment of certain classes in specified occupations; second, those regulating the hours of labor; and, third, those regulating the wages of labor.

Prohibitions of Employment.—The absolute prohibitions contained in the Maryland labor law with the two exceptions referring to the employment of women as barmaids^a

^a Code Public Local Laws 1888, Art. 13, Secs. 195-196.

and as waitresses in places of amusement³ are all confined to child labor. The laws forbidding absolutely the use of dangerous materials or methods in any occupation have obtained no foothold in this State. Indeed, there are few laws of this kind in the country, only one, the federal prohibitive tax on the phosphorous matchmaking industry, being a typical example. An anti-homework law might be desirable. This type of legislation is much more effective than the regulatory laws described in the last chapter, to which they are closely related, but the American tendency is towards regulation rather than absolute prohibition.

The usual prohibitions to be found in any State, then, refer to child labor; the education of the child and the protection of the young person, as he is technically called, being the ends of the law. Thus in Maryland no minor under twenty-one years of age is permitted to work in or in connection with any place where spirituous liquors are sold.⁴ It seems exceedingly doubtful whether this provision is strictly enforced for the difficulties of administration are obvious. Prohibition reform would, of course, be more efficient; and even putting the enforcement in the hands of the Liquor License Board might aid in increasing the effectiveness of the law.

Children under the age of eighteen years, as in most other industrial States, are forbidden to work in or about "blast furnaces, docks or wharves; or in the outside erection and repair of electric wires; in the running or management of elevators, lifts or hoisting machines or dynamos; in oiling or cleaning machinery in motion; . . . at switch tending, gate tending, track repairing or as brakemen, firemen, engineers, etc., upon railroads; . . . or in or about establishments, where . . . high or dangerous explosives are manufactured, compounded or stored . . ." or in

³ Code 1914, Art. 27, Secs. 442-443.

⁴ Laws 1912, Ch. 731, Sec. 22 (to be Art. 100 of Code); Code 1911, Art. 56, Sec. 98.

other like occupations wherein their immaturity would render them inefficient.⁵

Children under sixteen years of age are rigidly circumscribed in their employment. They are forbidden to be employed around dangerous machines as circular or band saws, picker machines or machines used in picking wool, cotton or any other material, job or cylinder printing presses operated by machinery, stamping machines and numerous others specified at great length. They are not permitted to work upon any steam, electric or hydraulic railway or on any machinery operated by power other than hand or foot power, or upon any vessel or boat engaged in navigation or commerce. Occupations wherein dangerous or poisonous acids are used are closed to them, as is mining and the allied occupation of tunneling. They are forbidden to perform in any concert hall or playhouse in connection with any professional theatrical performance, exhibition or show.⁶

There is also a prohibition of the employment of females under sixteen where such employment compels them to remain constantly standing.⁷ This is really more of a regulation of the conditions than of the terms of employment; and, though somewhat vague, it is fundamentally an exemplary piece of legislation in which Maryland seems to have established a precedence. Moreover, no child under sixteen can be employed in any occupation until he has obtained a permit from the Bureau of Statistics in Baltimore City or from the superintendent of schools in a county. These employment permits or certificates are of two classes, general and vacation employment certificates, and are issued only on the conditions of a satisfactory school record, of a favorable report from a competent physician, and evidence that the child is of legal age to work in the desired

⁵ Laws 1912, Ch. 731, Sec. 21.

⁶ Laws 1912, Ch. 731, Secs. 7-8, as amended by Laws 1916, Ch. 222, and see Code 1914, Art. 27, Sec. 346.

⁷ Laws 1916, Ch. 222, Sec. 23.

occupation.⁸ The granting of these certificates is regulated moreover by stringent administrative provisions. Similar to these certificates, but with the necessary differences, are the badges granted to boys between the ages of twelve and sixteen to sell papers and periodicals on the street during daylight.⁹

Subject to these stipulations and exceptions, it is legal in Maryland to employ children above the age of fourteen. Children under fourteen are forbidden to be employed "in, about or in connection with any mill, factory, mechanical establishment, tenement house, . . . office building, . . . public stable, garage or in any mercantile establishment . . . , place of amusement, club, etc.," in short, in most occupations.¹⁰ The fourteen year age limit is also established to a certain degree by prohibiting the employment under that age during school hours.¹¹ There are, however, in the Maryland law two provisions allowing the employment outside of school hours of children above the age of twelve in "canning or packing establishments,"¹² and of males above the age of twelve in the sale of periodicals and newspapers on the streets. Boys above ten may with a permit distribute papers on a regular route between the hours of 3:30 and 5:00 p.m.¹³ If the twelve year minimum is enforced in canneries and allied occupations, Maryland children are better protected than those in most other canning States, in New York, at least, it having been found practically impossible to enforce a fourteen year minimum.¹⁴

On the whole, this rubric of the Maryland labor law attains as high a standard as that set anywhere in the country. The Child Labor Law is a recent enactment and seems

⁸ Laws 1912, Ch. 731, Sec. 9 ff.

⁹ Ibid., Secs. 27-33.

¹⁰ Laws 1912, Ch. 731, Sec. 4, as amended by Acts 1916, Sec. 222.

¹¹ Laws 1912, Ch. 731, Sec. 6; Laws 1912, Ch. 173.

¹² Laws 1912, Ch. 731, Sec. 5.

¹³ Laws 1912, Ch. 731, Sec. 26, as finally amended by Laws 1916, Ch. 222.

¹⁴ See Annual Report of Commissioner of Labor, New York, 1914, p. 135.

to have been drafted in a scientific and careful manner, following rather closely the laws of New York and Massachusetts, which mark a high plane in the conservative reform law of this country. There is, however, one prohibition omitted in the Maryland labor law which experts have come to consider absolutely necessary. Most European countries and four American States, Connecticut, Massachusetts, New York and Vermont, forbid the employment of women for certain periods before and after childbirth. There is no doubt of the constitutionality of such a law, for it has been amply demonstrated that the community suffers from the high rate of mortality and morbidity of babies who fail to receive sufficient care from their mothers. Such a law, however, would involve a considerable step towards communism, especially as the perfected plan would call for some kind of aid from the State during the period of enforced rest.¹⁵

Hours.—The regulation of the hours of labor has caused the legislators of the last quarter of a century the greatest difficulty. The exact limit of their power has not been clearly defined, and they can never be sure that their enactments compelled by the clamors of reformers, economic and political, will be upheld by the courts. It is in fact within this rubric of the labor law that the attempt is sometimes made to limit the police power of the State. Somewhere a law ceases to be an exercise of the police power and becomes a taking of property without due process of law. The doctrine of reasonableness has been formulated by the courts, but this doctrine hardly gives any true clue to the problem. It is best to say that there is much hopeless conflict between the courts and that in the end each law must be considered on its own merits.

The economic argument for restricting the hours of labor has been so often iterated and reiterated that it has become

¹⁵ The Italian plan raises the fund for the care of the indigent mothers by taxing each woman of child-bearing age employed in any industry thirteen cents a month, each employer seven cents per month per woman of that age employed by him, and by an additional seven cents per woman contributed by the state.

shopworn; and it will not be worth while to set it forth at length. The arguments of the economists may well be accepted at their face value, but must then be considered from the viewpoint of legislation. The economic argument runs something like this: Long hours are physically injurious. Long hours stultify the intellectual growth of the individual because of lack of time for self-enlightenment. Long hours lead to immorality and excess in recreation. Long hours tend to lessen the influence of family life and ultimately to destroy it. The shortening of hours more than pays for itself in increased efficiency.¹⁶ And then, having heaped up facts, the economist will emphasize one of them, the physical deterioration or the intellectual stultification, depending on whether the law in question bears upon women or children. The courts accept this reasoning and uphold hours-of-labor laws for women and children. When a law limiting the hours of labor of men is presented to them, the courts have generally refused to sanction it, though the economic argument for it is precisely the same. There is here an inconsistency due to the lack of a complete scheme or philosophy of labor legislation.

The limitations on the hours of labor of children in Maryland were not of a very high standard until 1916. Prior to that there was, except for the two provisions aimed at keeping messengers and newsboys off the streets at night,¹⁷ only a general prohibition that no child under sixteen should labor more than ten hours a day in any manufacturing business in the State or in any mercantile establishment in Baltimore.¹⁸ Now there is a strict prohibition of labor of children under sixteen in enumerated occupations, including practically all except canning and domestic labor, for more than six days in any one week, or more than forty-eight

¹⁶ For a typical example, see the brief prepared by Mr. Louis Brandeis for the Consumers' League in *Muller v. Oregon*, 208 U. S. 412.

¹⁷ Laws 1912, Ch. 731, Secs. 24-32, and see also Code 1911, Art. 23, Sec. 375.

¹⁸ Code 1914, Art. 27, Sec. 239; Laws 1892, Ch. 443.

hours during that time, or more than eight hours in any one day, or between the hours of seven in the evening and seven in the morning. Moreover, the mere "presence of such child in any establishment shall be prima facie evidence of its employment."¹⁹ This is an almost ideal law, the exception of canning and domestic labor being necessitated by expediency. The prohibition of night work and the final administrative provision merit special attention. Minors above sixteen are not specially legislated for in Maryland and are included in the legislation for adults.

The maximum legal extent of employment for women in Maryland is ten hours in any one day and sixty hours in a week.²⁰ This law was enacted in 1912 after a bitter struggle, but, as it stands now on our statute book, Maryland ranks about on the level with most other States of the country in this respect. There are, however, two exceptions in the Maryland act which are interesting. The first exception exempts from the operation of the law females employed in the canning or preserving or preparation for canning or preserving of perishable fruits and vegetables. Although this exception has been bitterly assailed by the reform forces and although it is illogical and perhaps unsocial, yet it seems perfectly justified by expediency. New York, which has enacted a ten-hour law applying to canneries, has found it practically impossible to enforce it, though the labor commissioner has hopes of slow education up to the standard.²¹ Some sort of limitation of hours in canneries is needed—perhaps a graduated scale over several years would be feasible—but no law is better than an unenforced and unenforcible law. The other exception allows twelve hours' work on Saturdays and six days preceding Christmas in retail mercantile establishments outside the City of Baltimore, provided that there are two periods of rest on

¹⁹ Laws 1916, Ch. 222, Sec. 22A.

²⁰ Laws 1912, Ch. 79, as amended by Laws 1916, Ch. 147.

²¹ See Report of New York Commissioner of Labor for 1914, p. 133 ff.

those days and provided also that the women in these establishments work no more than nine hours a day during the remainder of the year. Here again the exception is not logically sound, but is dictated by administrative expediency. New York has a similar exception.

There is no prohibition of night work for women, that is, no hours between which women are not allowed to labor; only instead of ten hours per day being the legal limit a shorter day of eight hours is stipulated. This is a serious omission. Night work practically deprives women of any but the most meager period of rest on account of the insistence of household duties during the day when the worker is supposed to be sleeping. Moreover, night work makes the complete and efficient enforcement of the legal day almost impossible, for unless certain opening and closing hours are fixed, an inspector cannot unearth violations except by spending all his time in one factory checking up the various women as they come in and leave. Both New York and Massachusetts prohibit night work for women.

The limitations put upon the hours of labor of men are more in the nature of norms than absolute regulations. This is what would be expected. Thus eight hours is the legal day for employees of the City of Baltimore and for employees of contractors engaged in public work.²² There is an exception allowing overtime for the protection of life and property, an exception which can easily be stretched to cover ordinary overtime. Again, there is the provision that ten hours shall be the legal day in cotton and woolen manufactories²³ and in mines in Alleghany and Garrett counties,²⁴ but any adult male may contract to work longer. However, for public safety, street car employees²⁵ and train dispatchers on a railroad employing the block system²⁶ are limited to twelve and eight hours a day, respectively. These laws

²² Laws 1910, Ch. 94. See also Laws 1916, Ch. 134.

²³ Code 1911, Art. 100, Secs. 1-2.

²⁴ Code Public Local Laws 1888, Art. 12, Sec. 165; Art. 1, Sec. 194.

²⁵ Baltimore City Charter 1915, Secs. 793-5.

²⁶ Code 1911, Art. 23, Sec. 323.

are not important in a general estimate of labor conditions. The public-works law does give some evidence of the strength of labor as a political force and the ineffective laws display a further attempt of the legislature, bootless this time, to curry favor with the workingmen, but neither are particularly instructive examples of State activity.

Wages.—When we come to consider the third kind of legislation regulating the terms of employment, laws with regard to the wages of labor, an entirely new field is opened to the investigator. There are, of course, the enactments protecting the laborer against the fraud and delay of the employer, but what is most interesting to the student of legislation is the recent tendency of States to set minimum wages for various classes of workers. This is a reversion to the Middle Ages practice of setting a "fair and just" wage with the significant substitution of a legal minimum for a legally absolute wage. The distinction certainly is significant, but both the "fair and just" and the minimum wage are enactments of a very paternalistic government.

Recognizing "that not only hours and working conditions where there is inequality of bargaining, properly concern the state, but that the question of wages also has a direct connection with the welfare of the worker, and therefore of the public," a score of states, American and foreign, have enacted minimum wage laws. "Wages," it is further stated by this advocate of these laws, "have a decided bearing on the health of the employees. The workers who have sufficient nourishing food and who live under healthful conditions are more resistant to the evil effects of working conditions. Living conditions are dependent to a very large extent upon working conditions, and a betterment of hours and wages means a betterment of the mode of living and therefore of the efficiency of the worker."²⁷ The argument is incontestable if health is the standard according to which the state should guarantee every worker a "living wage,"

²⁷ Report of Industrial Commission of Wisconsin for Two Years Ending June 30, 1914, p. 58.

the protests of the capitalists to the contrary notwithstanding; but if the goal of state regulation is to establish equality of bargaining power, if the aim of state interference is to remedy causes, not symptoms, then minimum wage legislation seems beyond the limits of state activity, although perhaps a useful temporary expedient. Maryland has no minimum wage law, and, according to the doctrines which are advocated in this study, her stand is correct.

All of the laws, of course, apply only to females and minors, for the same reasons that all other laws relating to the terms of employment are restricted to them. Most of the enactments are general in their wording, leaving to administrative boards the interpretation of the general terms. "Every wage paid or agreed to be paid by an employer to any female or minor employee . . . shall be not less than a living wage" except that incompetents may be granted licenses to work at lower rates, says the Wisconsin law; and a "'living wage' shall mean compensation . . . sufficient to enable the employee . . . to maintain himself or herself" in "reasonable comfort, reasonable well-being, decency and moral well-being."²⁸ To administer these laws steps are taken very similar to those described in the last chapter in connection with the commission form of labor legislation. Some kind of commission is always given the administration of the law. If the commission has any reason to believe that the wages paid females or minors in any industry or trade are unreasonably low or if any individual or organization complains to the commission that such conditions exist, the commission will begin an investigation into the wage conditions in that industry. This preliminary investigation is usually *ex parte* and is in the nature of an inquest by the grand jury. If the commission decides that there is reason to believe that there is some truth in these suspicions, it appoints a board composed of employees and employers with sometimes a representative of the public to

²⁸ Wisconsin Acts 1913, Ch. 712, Sec. 1729, s-1, (4) and (5); 2, 7.

investigate thoroughly and determine on a living wage. This board usually has power to summon and pay witnesses and every one interested may appear. The minimum decided upon, either per day, per week or by the piece, according to the industry, is then reported back to the government commission, before whom may appear any complainants who are aggrieved at the board's findings. When the legal minimum is finally proclaimed, all employers in that industry must conform to the rulings of the commission. In some States, however, for example, Massachusetts,²⁹ the penalty for disobedience is merely uncomfortable publicity. If the minimum wage is really well founded such a sanction is sufficient.

It is obvious that under a minimum wage law the employer is not obliged to pay for what he does not receive, he must only pay a little more than he has been accustomed to pay. He is not obliged to pay a piece-worker so much per week no matter how much she may loaf during the week. He is not obliged to pay the unskilled as much as the skilled. The delinquent is allowed to work for less than the competent and children for less than adults. Most industries will not be affected by the legal minimum—wages there are above it—and those affected are expected to get more work for the higher wages through the increased efficiency of the workers. The minimum wage laws have been evolved to a high degree of efficiency in their details. Arguments against them must attack the fundamentals, not the superstructure.

Of an entirely different nature from the minimum wage laws are those enactments regulating the wage agreements of adult men; for though these laws are general and apply to all workers, it is because they include men that new legislative and constitutional principles are involved. This legislation is justified on the ground that it is aimed primarily at fraud. The employer on account of his position

²⁹ Massachusetts Acts 1912, Ch. 706, as amended by Acts 1914, Ch. 368.

as trustee for the earned but unpaid wages of his employees is in such a superior position that he is able, if he wishes, to exercise the most fraudulent compulsion upon the workers. It is at this evil that this last class of laws affecting the terms of labor is aimed. An example, though a rather extreme example, of the protection afforded by the State is the law forbidding railroad companies doing business within the State to withhold any part of the wages of its employees for the benefit of any relief association or the members thereof.⁸⁰ Most of the laws, however, are aimed at the insidious truck system, as it is called, which has now fortunately become practically extinct in the eastern sections of the country.⁸¹

The truck system has largely depended upon the fact that nature is so perverse as to establish her most necessary metallic resources in out-of-the-way places. Mining communities have always been on the economic frontier of civilization. A not unusual occurrence is the springing up of a full-sized town out of an uncultivated waste. In these cases the mining company is generally the owner of the town, the land, the homes and the public buildings. If not thus far centralized, at least the source of the food supply is in the hands of the mining company. At first the company is performing a real economic service in establishing the company store, and it is a real benefit to the workers to have a steady source from which to purchase their necessities instead of having to rely on the possibility of an itinerant huckster. This is the good side of the truck system; and, perhaps, in the right hands, the company store might remain a benefit to the laborers, although the monopolistic weapons of the shop are of a really dangerous nature. But

⁸⁰ Code 1911, Art. 23, Sec. 315.

⁸¹ Most of the information about the truck system has been taken from the Report of the Commissioners Appointed to Inquire into the Truck System, 1871. The general features of the system are so constant that, it is believed, nothing has been lost by using an English instead of an American source, especially since the English source is generally available and compact.

the truck system is usually attended by much more sinister forces.

The truck system is usually sustained by the maintenance of long intervals between pay days, although in Scotland it was found to exist where the interval was only two weeks. Now the miners as a class earn just about the marginal subsistence wages and have very little chance to be provident. If the employee does not begin his employment under the necessity of obtaining credit, he has many chances of acquiring this unenviable position. The company store avails itself of this opportunity in two ways. Sometimes it merely extends credit to the laborer, establishing a sort of lien on his accruing wages and collecting this lien by a system of bookkeeping in the company's office or by setting up a collection office so close to the paymaster's window that escape from its clutches is impossible. Its credits are therefore much safer than those of any chance competitor. Sometimes, where there exists the system of advances from the company's coffers on the men's wages, the store profits by a kind of moral compulsion to spend this voluntary advance in the company store, although more tangible constraint is not unknown: "black lists are often kept of slopers [those who do not spend the advances in the company store]; threats of dismissal were repeatedly proved; and cases of actual dismissal . . . are not rare."²² Moreover, even the most provident among the employees seem to think it to their advantage to deal at least to some extent at the company store: it is a natural impression for the worker to think that his job is more secure if he caters to his employer. The dominance which the employer can secure over the laborer is evident, the double profits which he can reap are enormous. And, moreover, the laborer rarely gets fair play, for monopoly and the credit features of a company store allow the owner to advance prices to a

²² Report of the Commissioners Appointed to Inquire into the Truck System, 1871, p. xvi.

considerable extent. The truck system, indeed, seems to call most urgently for state regulation.⁸³

In legislating upon this subject Maryland has had a checkered experience. The coal fields in the two western counties of the State furnished an ideal opportunity for the growth of the company store; and, though the conditions and the acts passed to meet those conditions are not of practical importance to-day, yet because of the number of these laws and because of the decisions based upon them it has been thought worth while to spend enough time on them at least to outline them. As far back as 1868 the legislature decreed that "no railroad or mining corporation . . . shall own, conduct or carry on any store, or have any interest in any store."⁸⁴ This law does not seem to have been very effective, for two other laws, this time local in their effect, were later enacted. By these every corporation engaged in mining or manufacturing or operating a railroad in Alleghany and Garrett counties was compelled to pay the wages of its employees in legal tender of the United States;⁸⁵ and, in Alleghany County, it is further provided that "no such corporation . . . shall issue any script or metallic or paper checks in payment of the sums due such employees, nor shall such employees make any contract with their employers by which such employees shall be compelled to purchase their supplies, merchandise or goods from any private or company stores owned and operated by said employers; nor shall . . . [the employers] exercise any influence whatever . . . to compel their employees to deal with any particular merchant or storekeepers."⁸⁶

This last amendment makes this law about as inclusive and adequate as it is possible to make a law regulating such a multiform evil. It is the direct outgrowth of a Maryland

⁸³ A regulation and prohibition of the truck system has been held constitutional in *Knoxville Iron Co. v. Harbison*, 183 U. S. 13.

⁸⁴ Laws 1868, Ch. 471, Sec. 217; Code 1911, Art. 23, Sec. 311.

⁸⁵ Code Public Local Laws 1888, Art. 1, Sec. 185; Laws 1892, Ch. 445.

⁸⁶ Amendment added by Laws 1900, Ch. 453.

case³⁷ construing an allied act and of a Supreme Court decision.³⁸ To understand this law a little history must be indulged in. The local law for Alleghany County as first passed was declared constitutional as a justified exercise of the police power of the State in *Shaffer v. Union Mining Co.*;³⁹ but it was held in this case that an assignment of wages to merchants who were tenants of the mining company was not included within the prohibition of the act. This decision much weakened the law, for the truck system has been found just as noxious when the store is run by tenants of the company as when run by the company itself. The law in fact proved inadequate and there was passed a bill rendering it unlawful for any officer or director of a mining or railroad corporation to have any interest in any general store in Alleghany County.⁴⁰ This act was aimed at what has recently become well known as interlocking directorates, but it was almost immediately declared unconstitutional as interfering with the equal protection of the laws.⁴¹ "Though it was perfectly competent," say the court, "for the legislature to prevent railroad and mining corporations from engaging in the business of bartering or selling goods . . . ; yet it was not within the power of the General Assembly to deny to particular individuals who happened to be officers of those corporations, and merely because they were such officers the right which every other citizen of the country . . . possessed to sell goods." And further, "the owners of a mine have no other control over the employee 'than that which may result from employing him, etc.; and every other employer of labor has precisely the same control over those who obtain or wish to obtain employment with him.'"⁴² In this case the court clearly refused to take judicial cognizance of the truck system and

³⁷ *Luman v. Hitchens*, 90 Md. 14; 46 L. R. A. 393.

³⁸ *Knoxville Iron Co. v. Harbison*; see above.

³⁹ 55 Md. 74.

⁴⁰ Laws 1898, Ch. 493.

⁴¹ *Luman v. Hitchens*; see above.

⁴² Quoting from *Fraser v. People*, 141 Ill. 171; 16 L. R. A. 492.

especially of the truck system as it flourished in Alleghany County, Maryland. The case was decided on purely legal grounds; and, being one of those cases in which constitutionality was peculiarly a question of fact, it is submitted that the court was in error. This case, however, is not so reactionary and destructive as a case which followed it, that of *Luman v. Hitchens*. This case led to the amendment of the earlier law and the amendment, as has been intimated, is really more efficient than the unconstitutional act.

Thus far only those laws directly attacking the truck system have been considered; but since the truck system depends for its maintenance upon long intervals between pay days, acts regulating the time of pay will be practically as efficacious as the out-and-out company store laws. Maryland has three such acts on her statute book, though it is probable that only one is really constitutional. This is a law contained in the corporation article of the code decreeing that "every association or corporation doing business in the State of Maryland employing wage earners . . . in the business of mining, manufacturing, operating a steam or electric railroad, street railway, telegraph, telephone or express company shall make payments in lawful money of the United States semi-monthly to said employees."⁴³ This law seems to include all businesses mentioned in the previous law pertaining to corporations engaged in mining and shipping coal in Alleghany County,⁴⁴ so that this earlier law is entirely superseded. A later act was passed, however, applying the same terms to "all corporations and *individual mine-owners* . . . engaged in mining coal or fire clay in Garrett County."⁴⁵ This addition of "individual mine-owners" was the result of the decision of *Luman v. Hitchens*,⁴⁶ which was interpreted as based on the singling out of corporations for stricter regulations. In *State v. Potomac Coal Company*,⁴⁷ however, the court on the ground

⁴³ Code 1911, Art. 23, Sec. 123.

⁴⁴ Laws 1896, Ch. 133.

⁴⁵ Laws 1910, Ch. 211.

⁴⁶ Cited above.

⁴⁷ 116 Md. 380.

of the earlier case declared the later act unconstitutional as a violation of the "equal protection of the laws" clause because the law was confined to the mining industry in the one county. The court again based its decision on purely legal grounds and seems to have narrowed the police power to an unreasonable extent. Though the court's argument seems discouragingly restrictive, and not specifically based on facts, the facts do nevertheless to a great degree uphold it, for the truck system in 1911 was not nearly so insidious as it was when the court refused to recognize it in 1899. It is, however, lucky that the adverse decision of the court came after the truck system had virtually disappeared, for it would have been practically impossible to legislate against it if the industries in which it was prevalent could not have been reached by special legislation.

Any discussion of state regulation of the terms of employment should include at least a mention of the tendency towards state aided pensions for sickness, old age, unemployment and the like. This movement has attained great prominence in many foreign countries, and recently Great Britain has followed the lead of the more radical Dominions. One such scheme of state aid in the unemployment insurance of labor unions will be discussed in the last chapter as a means whereby the state might obtain control of union affairs. As such, as a governmental device, these pensions are perhaps justified; but, as purely social legislation, they are quite beyond the police power of the state as it is conceived in this study, whether we define the police power from a legal or a legislative point of view.

CHAPTER VI

SOME MISCELLANEOUS LAWS

There will be considered in this chapter a number of laws which are only incidentally labor laws, but which play an important part in the legal and social welfare of Maryland. These will be treated under four heads: (1) license laws; (2) laws governing attachments and liens for wages—laws of legal practice and procedure primarily; (3) child welfare laws; and (4) State employment laws.

Licenses.—There is in Maryland the beginning of a license system. In so far as it is intended for a comprehensive system of licensing occupations in order to make the State a sponsor for the proficiency of its working people, the Maryland license laws are really only a beginning, but compared with the license laws of other States, they seem fairly extensive. Licenses are required of barbers, plumbers and chauffeurs throughout the State, and of electricians, horseshoers, moving picture operators, stationary engineers and master stevedores in Baltimore City. Practically the only important occupation licensed in other States which is not licensed in Maryland is mining; but withal the Maryland miners are an efficient and intelligent class.

Licenses are required by the State for two reasons. Some license laws, as, for instance, those controlling peddlers and real estate dealers, are enacted purely for revenue purposes. They indirectly serve as police measures, but their primary purpose is to secure revenue.¹ The other class of license laws, beginning with those regulating the practice of medicine and law and extending down to horseshoers, are enacted primarily as police measures to protect the public from quacks and inefficient workmen. To this

¹ See *Coates v. Locust Point Co.*, 102 Md. 297.

class belong all the laws affecting the laborer except perhaps the master stevedore law,² which as it now stands in its emasculated form is hard to understand. As first enacted, it required both a license fee and a bond to secure the payment of wages to the journeymen stevedores. The Court of Appeals, however, declared the bonding provision unconstitutional, but did not question the licensing section;³ yet it is hard to see why, if the State can protect those workers who are hired by a master stevedore against fraud and insolvency by a twenty-five dollar license fee, it cannot more adequately protect them by a thousand dollar bond. The regard of the courts for the historical activities of the State and their aversion towards new modes of State activity is perhaps the only explanation.

The other laws,⁴ if considered together, suggest an interesting hypothesis. Except for the chauffeurs, an exception which is easily explained, all the occupations licensed in Maryland are organized into substantial unions. Is the State, perhaps unconsciously, rendering a most valuable aid to the organizing of these occupations? That the unions are strongly in favor of these laws and that they put forth every effort of which they are capable to secure them is an un concealed fact; that their efforts are of much avail and that the results are beneficial is more debatable. That these laws are of some use seems indisputable. A typical instance is furnished by the operation of the laws of the Middle Western States licensing miners. When a strike is the order of the day, the men in the mines stop work and the mine owners are unable to fill their places because of the lack of licensed men outside the ranks of the strikers. This is true,

² Baltimore City Charter 1915, Sec. 700A.

³ *Steeken v. State*, 88 Md. 708.

⁴ The various laws are codified as follows: Barbers, Code 1911, Art. 43, Secs. 209-222; Chauffeurs, Code 1911, Art. 56, Sec. 139; Electricians, Baltimore City Charter 1915, Sec. 663, m-q; Horse-shoers, Baltimore City Charter 1915, Sec. 515, a-f; Moving Picture Operators, Laws 1912, Ch. 814; Plumbers, Code 1911, Art. 43, Secs. 223-229, with exceptions contained in Laws 1912, Chs. 764, 845; Stationary Engineers, Baltimore City Code 1906, Sec. 427, as amended by Laws 1910, Ch. 662, and Sec. 428.

of course, only if employment at the time of the strike is at a high ebb; but employment usually is at a high ebb when a strike is essayed, for this weapon is only efficient in prosperous times. The a priori argument advanced as to the benefit to the unions of licensing laws seems again to be borne out by the fact that most licensed occupations are organized, though, here too, the argument is not conclusive because of the probable functional relation of organization and license laws. The argument based on the unorganized condition of such licensed occupations as trained nurses and chauffeurs, which is often used to offset that conclusion that licensing and unionization are closely related, seems hardly tenable because of the inherent nature of these occupations. That licensing is not a sufficiently strong unionizing device to unionize unorganizable occupations is freely conceded, but it is nevertheless strongly maintained that it is a stimulus towards organization. The desirability of unionization by means of a licensing system is doubtful. It certainly tends to make the union policy one of restriction rather than of progress; and if its effect is to cause the American unions to pattern their policy after that of the British unions, it is open to strong disapprobation.

The administration of these laws is not of much importance in this study and as it is practically the same in all the laws, one explanation will suffice. Except for the chauffeurs, where the administration is quite naturally in the hands of the automobile commissioner, all of the laws are enforced by a board generally of men practiced in the regulated occupation and generally appointed by the governor. The meetings of this board are in most cases left to the discretion of the board itself, though sometimes a minimum is fixed and sometimes, even in general laws, a certain number of meetings must be held in Baltimore. The members of the board are usually paid a per diem and travelling expenses to be obtained from the fees of the applicants for licenses. The board is allowed full discretion in setting the examination where an examination is required, and this dis-

cretion seems well placed because of the practical training of the members of the board. The applicant must qualify only once before the granting body, but in the case of plumbers, moving picture operators and stationary engineers the license is good for only one year and the worker is of right entitled to a renewal upon the payment of a renewal fee. There has been some litigation as to the interpretation and application of these laws,⁵ but since these laws are not of great importance in the sum total of labor legislation of the State, the litigation needs no discussion.

Attachments and Liens.—There must next be considered certain laws which, if not in all cases a protection of the laborer, aim to further his welfare in legal proceedings. Maryland does not hold any peculiar position in regard to these laws, neither above nor below the average, for it has been generally agreed that they are just and necessary and, in most States, are of the same general nature. They include mechanics' lien laws, laws preferring wages in assignments and similar laws. These laws are justified upon the ground that the workingman, since he must always work a certain length of time before he receives his wages, is always to a degree involuntarily in the debt of his employer. The employer really stands more in the nature of a trustee to the workingman than of a debtor, for the laborer hardly looks upon his contract as one in which he extends credit to the employer. It is right, therefore, that the laborer should have greater security for his wages than the ordinary debtor for his debt. The truck laws, which have already been considered, are a related branch of legislation, which seems proper irrespective of the conditions of the laborers as a class.

In pursuance of this policy, the Maryland legislature early began to accumulate these laws on the statute books. Thus there are mechanics' liens extending to buildings, ma-

⁵ Concerning the plumber law, see *Davidson v. State*, 77 Md. 388. For the interpretation of the barber law, see *State v. Tag*, 100 Md. 588.

chines, wharves, bridges, boats⁶ and even wells in Garrett County,⁷ giving to those engaged in the construction of these structures priority in the security for their wages over all except in the case of vessels, prior mortgages and sales. So also, in insolvency assignments, wages due for not more than three months are preferred to all claims except prior recorded liens on the property;⁸ and in an execution against property in Alleghany and Garrett counties sufficient of this property is exempted to pay all wage claims.⁹ In a different spirit but again from public policy toward all and not toward a class is the exemption of all tools and mechanical instruments from execution on a judgment.¹⁰ Still different and really quite without the scope of labor legislation are those laws regulating strictly the attachment¹¹ and assignment¹² of wages. These last are merely mentioned because the words "wages" or "laborer" occurs in them and, therefore, necessarily the workingman is affected by them; they are not social legislation to so great an extent as are those, for example, preferring the laborer in insolvency.

Child Welfare.—A third group of laws deal with children, apprenticeship and education. Their philosophy is the same as that of the laws considered in the preceding chapter, which the State has enacted in conservation of child life. Their subject matter, however, is not the relation of employer and employee, but the policy of the State toward its children and, hence, is not included in the terms of employment.

Historically, the apprentice law came first. When it is remembered that the first Maryland enactment of this kind was as early as 1715,¹³ it is hardly necessary to explain

⁶ Code 1911, Art. 63, Secs. 1-52.

⁷ Laws 1894, Ch. 608.

⁸ Code 1911, Art. 47, Sec. 15.

⁹ Code Public Local Laws 1888, Art. 1, Sec. 193; Art. 12, Sec. 149.

¹⁰ Code 1911, Art. 83, Sec. 10.

¹¹ Code 1911, Art. 9, Secs. 33-34.

¹² Code 1911, Art. 8, Secs. 11-17.

¹³ See Laws 1715, Ch. 19.

that the State has not seen fit to regulate the terms of apprenticeship, which it has properly left to the individual and especially the union, but has merely laid down the fundamental principles upon which the contract or status of apprenticeship is based. The law as it now stands,¹⁴ for instance, allows the father, but not the mother,¹⁵ to bind out a minor child until the age of twenty-one in the case of males and eighteen in that of females. The Orphans' Court may also bind out for the same term any orphan whose inheritance is not sufficient to support him, or any other child whose parents fail or are unable to support him. Of course the prohibitions against child labor are binding upon the Orphans' Court.

Then there is the elaborate school attendance law¹⁶ of 1912 which was passed in connection with the child labor law of that year and which requires every child not mentally deficient between the ages of eight and fourteen to attend school throughout the entire session, and also every child between the ages of fourteen and sixteen unless he has been granted an employment certificate. An efficient and complete administration has been provided in this act and in these respects it is perfectly adequate. The usefulness of the act, however, depends upon the general usefulness of the school system, and although the Maryland school system is perhaps above the average, it still falls short of the highest standards. Without going beyond the scope of this study mention may be made of the schools of mining which have been authorized in Alleghany County for the large mining population of that county.¹⁷

The latest activity of the State in the field of child welfare is the limited mothers' pension law of 1916.¹⁸ Here again we have a stretching of the function of the State until it verges rather dangerously upon socialism. The law,

¹⁴ Code 1911, Art. 6.

¹⁵ *Baker v. Lauterback*, 68 Md. 69.

¹⁶ Laws 1912, Ch. 173.

¹⁷ Code Public Local Laws 1888, Art. 1, Secs. 218-225.

¹⁸ Laws 1916, Ch. 670.

however, though properly classed as social legislation, is hardly in the rubric of labor legislation, and an intensive examination of its philosophy would be superfluous. "Any mother of a child or children under the age of fourteen years, whose husband is dead, and who is unable to support it or them and maintain her home" may apply for relief to the county commissioners in the counties or to the special Board for Mothers' Relief for Baltimore City. If, after investigation, it is found "that unless relief is granted, the mother will be unable to support and educate her children, and that they may become a public charge," she is referred to the Juvenile Court which may order to be paid her twelve dollars per month for the oldest child, ten dollars for the next, and six dollars for each additional child up to forty dollars a month. The administrative agency is to keep in touch with its dependents, to visit them at least once every two months, and to see that the relief is properly applied for the welfare of the children.

State Employment.—The last series of laws which fall into a clearly defined group are those laws in which the State regulates the terms of employment of its own employees or those of its subdivisions. In the United States this kind of legislation is generally political in its nature, it is generally passed primarily as a bid for the labor vote and only secondarily as a social measure; but on the Continent, in Germany particularly, this species of legislation plays an important part in the administrative organization of the country.

In the first place, it has been decreed that preference shall be given to voters in filling the jobs on the public work of Baltimore City.¹⁹ A probable reason for this law is to enable the party in control of the city government to use the city's money for electioneering purposes. The other laws regulating this subject are not so brazen, yet their political effect is as certain. "For all laborers, workmen or mechanics who may be employed by or on behalf of the

¹⁹ Baltimore City Code 1906, Art. 35, Sec. 6.

Mayor and City Council of Baltimore," eight hours shall constitute a day's work except in emergencies. Moreover, "the rate of per diem wages paid to laborers, workmen or mechanics employed directly by the Mayor, etc., shall not be less than two dollars per diem," and where the work is contracted out "not less than the current rate of per diem wages in the locality where the work is performed shall be paid";²⁰ and these wages shall be paid weekly.²¹ This legislation has always been upheld as constitutional, but it hardly seems that the State is performing a proper legislative function in enacting these laws. It is quite true that the State has a right to stipulate in its contracts any terms that it wishes, but efficiency demands that an administrative head have some discretion in respect to the terms of employment which he contracts for. The laborer would hardly suffer from the exercise of administrative discretion and its resulting elasticity. Yet it must be admitted that practically every State of the Union has felt the necessity of enacting legislation of this type.

Massachusetts State employment legislation represents a more extreme type. Superficially it may seem a startling step towards socialism, but on closer examination it seems to have been an attempt to secure efficient administration. It is aimed at attaining that thing, so harsh-sounding to the democratic ear, yet seeming so necessary in a representative government, a bureaucracy. In the first place, a civil service examination must be passed before one is eligible for a state job.²² Then to secure some sort of permanency in state employment and to make this employment more attractive, a state-aided old-age pension scheme is devised for state, county and city employees.²³ It is a well-known fact that Massachusetts has a very efficient government. How far its efficiency is due to the measures just mentioned is diffi-

²⁰ Laws 1910, Ch. 94, Sec. 2.

²¹ Baltimore City Code 1906, Sec. 47.

²² Massachusetts Revised Laws 1902, Ch. 19, Secs. 12-13.

²³ Mass. Laws 1910, Ch. 559; Laws 1911, Ch. 532.

cult to estimate; but in view of European experience it seems that something like the Massachusetts plan is necessary to invigorate American administration.

Laws which defy classification are: the Sunday rest law,²⁴ the law establishing Labor Day,²⁵ a law requiring every employer to allow all of his employees sufficient time for voting at all elections,²⁶ and a law of 1912 requiring physicians to report all cases of occupational sickness which they are called upon to attend.²⁷ The last named law as it now stands is designed merely for statistical purposes; but since it may lead to greater things in the way of the prevention of occupational diseases it is properly treated as a labor enactment. Finally, in pursuance of the special care which the law has always had for seamen, there is on the Maryland books a law protecting them from the solicitations of any kind of sailors' employment agencies.²⁸

²⁴ Code 1914, Art. 27, Sec. 435.

²⁵ Baltimore City Code 1906, Art. 15, Sec. 2.

²⁶ Code 1911, Art. 33, Sec. 91.

²⁷ Laws 1912, Ch. 165, Sec. 5A.

²⁸ Code 1911, Art. 84, Secs. 1-7.

CHAPTER VII

THE ADMINISTRATIVE SYSTEM

The lawyer usually feels that administration and law are things apart and a legal treatise generally contents itself with a consideration of the substantive law, leaving administration to the care of the social reformer. With the exception of the law of the labor union, however, the present study has been confined to the analysis of the works of social reformers. Moreover, we have been dealing with the science of legislation quite as much as with the science of law, and legislation generally includes administration. The common law and most codifying legislation is remedial, compensatory; labor legislation is restrictive, prohibitive. Labor legislation, though it is often attacked as class legislation in its narrow and obnoxious sense, is in reality enacted for the benefit of the community as a whole; its violation is more in the nature of a crime against the state than an injury to the individual. In the community, therefore, lies the responsibility of guarding against the violation of this legislation, against the slightest deviation from its prescriptions. In the community, not in the individual, must rest the initiative of bringing this law into operation.

An adequate labor law is accordingly dependent upon efficient administrative provisions. As a chain is no stronger than its weakest link, neither is labor legislation more efficacious than its administrative system. Considering Maryland legislation from the standpoint of administrative efficiency one cannot grant it high rank. Even the greatest optimist would find himself somewhat doubtful, to say the least, of the sagacity of the sovereign people of Maryland after a talk with those charged with the administration of the labor law. In order to give this subject adequate treat-

ment in this study, it has seemed best to give first a complete description of the administration as it now exists and has existed, refraining as far as possible from any critical comment. Having tried to understand the existing system, we shall subject it to criticism and then attempt to outline an adequate scheme of administration.

Before going any further, it must be understood, the title of this chapter to the contrary notwithstanding, that there is no administrative system for carrying out the labor laws of Maryland. Administration there is, but system—hardly. This criticism, of course, has been partly met by the legislation of 1916; but this reform—for reform it was—hardly necessitates any qualification of the statement that Maryland, like most other American States, is happy-go-lucky when it comes to legislating. A preconceived system is rarely, if ever, thought out. An evil arises; it is legislated against; and, if administration must be provided for, a special official or board is designated. That is what has happened in the labor legislation. In spite of the recent centralizing amendment, there are still eight separate and distinct administrative agencies for Maryland labor law, only one of which, the State Board of Labor and Statistics, is charged with the administration of more than one law. Besides this board, there are the State Board of Health, the city inspector of buildings, the city health commissioner, the Industrial Accident Commission—all real administrative devices, and the police marshals, the constable of Carroll County, and the city collector of water rents, who perform administrative functions in connection with the labor law.

State Board of Labor and Statistics.—By far the most important administrative agency is the State Board of Labor and Statistics. This, by the act of 1916,¹ is the Maryland equivalent of a labor department, though still a rather circumscribed equivalent. It is the successor to and an improvement upon the old Bureau of Statistics and Informa-

¹ Laws 1916, Ch. 406.

tion, which, as originally established in 1884,² was hardly more than what its name implies, a bureau for the dissemination of information, but which by gradual accretion and the accompanying process of selection was burdened more and more with the enforcement of the labor law, until within the last two or three years it had come to confine itself entirely to labor problems. The new state board is, of course, entirely devoted to labor problems. The old bureau was the only centralizing influence in the Maryland labor law and the endeavor of the legislation of 1916 was to increase this centralization.

The State Board of Labor and Statistics is composed of three commissioners appointed by the governor for a two-year term. One of the commissioners is designated chairman by the governor at a salary of twenty-five hundred dollars and the other two are merely advisory members of the board. The chairman is the executive head of the board and most of the activities of the department are directed by him personally. The board as a whole meets only once a month to determine the policy of the department. Its business, however, is, it would seem, more to ratify the acts of the chairman than to lay down any positive policy, for the chairman with his more intimate knowledge of the affairs of the department should be able to dictate rather effectively the administrative program of the board. This is especially so for the reason that the duties of the board are not administrative in the broader sense, as described in the fourth chapter, but are almost entirely executive. The Maryland legislature followed the plans of New York and Massachusetts, but did not give the commissioners the administrative powers which they have in those States. The board is a good beginning, but as the law now stands, the two advisory members seem somewhat superfluous.

"The State Board of Labor and Statistics is authorized and empowered to appoint . . . such deputies, inspectors, assistants, and employees of every kind as may be necessary

² Laws 1884, Ch. 211; Code 1911, Art. 89, Sec. 1.

for the performance of the duties now or hereafter imposed upon it," provided, however, that all appointments shall be subject to the approval of the governor.³ The board has now⁴ sixteen employees, including two medical examiners, two boiler inspectors, two mining inspectors, its regular inspectors, officers to issue child labor permits, clerks and stenographers. These positions are all frankly regarded as political plums. The only qualification needed by an applicant is sufficient political "pull" in his or her ward. Not only that, but since the board cannot hire the cheapest service without the approval of the governor, it results that when once employed, it is impossible to discharge for any reason an inspector upon whom the party in power depends to carry his ward. This is absolutely true of the men employed in the department. The women, it is said, are easier to remove on account of inefficiency because they do not swing so many votes. Moreover, I have been told, though my informant is a woman, the then assistant-chief of the old bureau, that as a whole the women are more likely to be efficient than the men; and certainly they take their work more seriously. Yet it cannot be proposed that all the inspectors should be women, for men are required for some jobs. About half the employees of the board are women.

The duties of the board are many and varied. Inherited from the old bureau is its duty to collect and disseminate information. The board is "to collect statistics and examine into the condition of labor in this State, with especial reference to wages, and the causes of strikes and disagreements between employers and employees."⁵ In the law are set forth many other matters of economic interest concerning which the board is ordered to investigate and publish information, but of late the board has confined itself rather closely to labor conditions. In pursuance of the duty imposed upon it by these sections of the law, the board publishes annually a lengthy report to the governor.

³ Laws 1916, Ch. 406, Sec. 1, Par. 3.

⁴ July, 1916.

⁵ Code 1911, Art. 89, Sec. 2; Laws 1888, Ch. 173.

The board is also empowered "to organize, establish and conduct free employment agencies, in such parts of the State as it may deem advisable, for the free use of the citizens of the State."⁶ This is a great improvement over the old law, which provided for only one agency, but it is still deficient in that the legislature does not seem to realize the seriousness of the problem of unemployment. It is now usually held that a system of free employment offices which aims to increase the fluidity of the labor market is one of the most efficient remedies of unemployment.⁷ As a consequence of this, the State should expend every means to furnish the most adequate system. This Maryland has hardly done. The board has established agencies in Baltimore, Cumberland, Hagerstown and on the Eastern Shore, but these agencies are not closely enough coordinated. In connection with the establishment of free employment agencies, the board should have the licensing and supervision of private employment agencies; but this power is vested in the city collector of water rents.⁸

The state board, it will be remembered, has also in its charge the administration of the law providing for the settlement of labor disputes.⁹

The chief duty of the board, however, is the inspection of factories and workshops. There are three inspection laws which the board enforces, the factory inspection and industrial registration law, the child labor law, and the women's ten-hour law. For this inspection the board has appointed five inspectors in Baltimore City, one, with the possibility of an increase to two in Western Maryland, and one on the Eastern Shore, each at a salary of about one thousand dollars. For the purposes of this inspection, Bal-

⁶ Code 1911, Art. 89, Sec. 2, Par. 7, as amended by Laws 1916, Ch. 406, Sec. 2.

⁷ For a full treatment of this subject, see an article on state employment agencies by Wm. M. Leiserson in 29 *Political Science Quarterly*, p. 28.

⁸ Ordinances of Mayor and City Council of Baltimore, 1909-10, No. 433.

⁹ See Chapter II.

timore is divided into five districts, each of which is assigned to an inspector who is responsible for the inspection and conditions in his district. How this responsibility is enforced has not yet been worked out and seems to be in a rather vague state, but a system of checking up could be easily instituted. But this localization of the work of an inspector can lead to valuable results if the inspector by frequent visits can get into friendly relations with the employer and persuade rather than force him to better the conditions of his plant. It is doubtful whether this consummation can be attained under the present law, but the beginning is worth while. In the first place, the laws as they now exist lay down exact rules and leave nothing to the discretion of the board or inspector, and the instructions given to the inspectors accentuate the routine character of their work. In the second place, the inspector has to inspect in pursuance of three separate acts and it seems that the districts will be too large for the intensive inspection that this plan requires. It is doubtful in fact whether five inspectors are sufficient for the minimum efficiency of the laws. Finally, the character of the inspectors who are political appointees of doubtful efficiency is such as to make decidedly improbable the attainment of the best results and to render doubtful the careful inspection which the laws require.

Turning now to the first of these laws which the board enforces, the factory inspection and industrial registration law,¹⁰ we shall examine the administration of it in detail before considering the other two laws. It has already been said that the inspection facilities for the enforcement of this law are deficient both in quantity and quality; but even with four or five inspections per shop a year by trained inspectors, which would furnish an adequate inspection, it is doubtful whether this act could reach the pinnacle of efficiency. As far as obtaining information and statistics from the employers and workers covered by this act, the board

¹⁰ Laws 1914, Ch. 779.

has full and discretionary authority, and the reports in this respect are valuable, notwithstanding their incompleteness due to the shiftless methods of the inspectors. When, however, the actual enforcement of the sanitary and safety provisions of the law is considered it is obvious that the division of authority in the enforcement of this act makes completeness impossible.

When the inspectors are sent out on their tours of investigation, their duty is to visit and inspect thoroughly every factory, workshop or tenement shop in the territory to which they have been assigned. Upon visiting the work place the inspector notes the toilet conditions, the presence of fire-escapes and the location of staircases, the existence of any communicable disease, and, if the shop savors to the least degree of tenement or loft shop, the inspector further measures the cubic capacity of the room. This is the routine whether the inspection be within the regular investigation or whether it be undertaken upon the application of a home-worker for a license for his shop. The standards of the inspection are the same in both cases, for the license, as will be remembered, is revocable at any time by the board. After completing the investigating for the day, the inspector returns to the office and notes the results of his inspection on the forms provided for filing. That is as far as the inspector goes.

The report as thus filed is subject to the authority of three separate administrative agencies. The board has the power in itself to enforce only the provision limiting the number of persons employed in any room to one to each five hundred cubic feet of air space. If the shop inspected seems to lack adequate fire-escapes required by law, the report is referred to the city inspector of buildings. In him is vested the duty of visiting and inspecting all manufactories employing twenty-five or more persons and of ruling on the adequacy of fire-escapes.¹¹ Neither of these duties

¹¹ Baltimore City Charter 1915, Secs. 80-81; Ordinances of Baltimore, 1908-09, No. 155, Sec. 3, Pars. 6-7; Laws 1908, Ch. 495.

is very strictly enforced. The inspection he leaves entirely in the hands of the State Board of Labor and Statistics, and perhaps it is better so, although the city department has, in fact, a number of inspectors. The provisions for fire-escapes are interpreted so loosely that, as has been said, they are considered fulfilled if the house in which the shop is located has two staircases of any kind in different parts of the building or one central staircase. The result of this division of authority, as is always the case, is that the law is practically nullified. The state board is afraid, and in truth is hardly empowered, to make more stringent regulations than those of the city building inspector, so that here there is no compelling authority. The building inspector, on the other hand, does not consider himself delegated with any authority to protect the safety of the employees. As the secretary of the department once said: "Oh, no; we don't make any trouble. We are a kind of complaint department. The fire department and the labor department send us their complaints and we try to straighten them out." The "straightening" is hardly in the direction of strictness.

As for the sanitary conditions of the shop, or tenement, a different course of proceeding is established. In the first place, it is provided by statute that before any license for a tenement is issued the records of the local health department shall be investigated, and if they show "the presence of any infectious, contagious or communicable disease, or the existence of any unsanitary conditions," the license may be refused without any inspection of the room or apartment. Usually, however, the room or shop is investigated, and then the report referred to the local health department. If the health department finds from its own records and the report of the inspector that the place is sanitary, a license is always issued by the board, for in this case as in others the board refuses to adopt any higher standard than that set by the more technical local department and here again the standard is low. If the health department, on the other

hand, finds from an examination of the records and report that the place is below the minimum, the license is withheld until these defects are remedied, and even then it is not issued until the approval of the health department is obtained.

It is obvious from what has been said that however good this law may be in its substantive provisions and however complete may be the records obtained under this act, in final results, because of the great division of administrative responsibility and the inefficiency of the personnel to which is entrusted the enforcement, the law fails to realize a large amount of its potential value.

Next in importance to the factory inspection law is the recent child labor law.¹² As has been said in a previous chapter, this is a most valuable act and in draftsmanship one of the best on the statute book. The act goes into great detail in establishing administrative provisions for its enforcement and an exhaustive study might profitably be made of these administrative details; but it will serve our purpose in the general estimate of the Maryland system of labor law administration merely to point out the salient features of these administrative provisions.

After the inspections under the factory law, the next duty of the inspectors is to investigate the ages and conditions of employment of children. The inspection under this law should be more efficient than under the law which we have just been considering, for no skill is required and no technical training necessary. Even a political appointee should be able to prepare a complete report. The task of the inspector is merely to see that the employer complies with certain provisions, such as the keeping of a registry, to examine the certificates of any children who are below sixteen, to ascertain the true age of any child who appears younger than sixteen, the employer being compelled to furnish within fifteen days satisfactory evidence that a child apparently under sixteen is in fact over sixteen or to cease

¹² Laws 1912, Ch. 731, as amended in 1916.

to employ that child;¹³ and, finally, to tabulate the number of children employed in the various occupations in the factory. If any child is employed in an occupation below the age which the law provides, the inspector will notify and warn the employer, but usually prosecutions and the preliminaries are managed from the home office. One of the child labor inspectors under the old bureau had in practice been found to be more efficient than the others and she had been assigned to investigational work similar to that performed by the British lady inspectors. One section of the law¹⁴ prohibits the employment of children under sixteen in certain specified employments or "in any other occupation dangerous to life and limb, or injurious to the health or morals of such child." Instead of leaving the interpretation of this section to the discretion of the individual inspector, the bureau had assigned this more efficient inspector to the work of ascertaining what are dangerous occupations and was to issue administrative orders on the basis of this investigation. This was really a notable step in advance and fuller mention will be made of it later. It is to be hoped that it will be developed further by the state board.

The task of issuing employment certificates and street trade badges is a somewhat heavy one and when the act first went into force the offices of the old bureau were swamped with applicants. Detailed provisions are made in the act as to the requirements which must be fulfilled before these permits are issued and granting them is not an indiscriminate, clerical operation. In Baltimore City the board is empowered to issue these employment certificates, and in the counties the county superintendent of schools has concurrent jurisdiction with it. In the offices of the state board there is a special inspector at a higher salary, whose only work is to issue these certificates and to keep a file of the duplicates. The two physicians, also, earn their pay merely by examining applicants for certificates. The re-

¹³ Ibid., Sec. 19.

¹⁴ Ibid., Sec. 8.

ports of these examinations promise to become valuable sociological statistics. In reality, the board issues the great majority of the employment certificates for city and counties; but when the school superintendent issues a certificate in one of the counties he is empowered to employ a physician at a stipulated fee to make the examination and is required to transmit all records to the board. One of the child labor inspectors is detailed to take charge of the issuing of badges to boys under sixteen engaged in street trade.

Both in administrative provisions and administrative practice this is one of the most satisfactory and efficient laws in the Maryland labor code. Nevertheless, there is one defect, perhaps practically unavoidable. This law and the compulsory school attendance law dovetail exactly and, in fact, the enforcement of these laws is indiscriminately confided to attendance officers and inspectors from the State Board of Labor and Statistics. The attendance officers and the inspectors are responsible and report to different chiefs who are themselves in no way related and have no official correspondence. It seems that here a valuable opportunity to check up results has been lost.

The other inspection law enforced by the state board, the women's ten-hour law,¹⁵ has no interesting administrative features. The inspector merely notices that the substantive provisions of the law, such as the posting of schedules, are obeyed. This law, for political reasons, was formerly enforced by a special bureau composed only of women. One of the most obvious reforms of the 1916 amendment was the placing of the administration of this law under the supervision of the same agency which enforced the child labor law.

Two other inspection laws were brought under the indirect control of the State Board of Labor and Statistics by the 1916 legislature. The board with the approval of the governor appoints two boiler inspectors for Baltimore City¹⁶

¹⁵ Laws 1912, Ch. 79, as amended in 1914 and 1916.

¹⁶ Baltimore City Charter 1915, Secs. 572-589, as amended by Laws 1916, Ch. 207.

and a mine inspector for Alleghany and one for Garrett County.¹⁷ Aside from this power of appointment and the fact that the board supplies the boiler inspectors with office rooms and receives annual reports from these officers, there is no coordination between these separate agencies. The legislature attempted to introduce a centralized system, but merely centralized the structure, not the system. The boiler inspection and the mine inspection laws have not been changed by the amalgamation. The inspectors under these laws are also political appointees, but the mine inspectors must "possess a competent and practical knowledge of the different systems of mining and [ventilation] . . . and of the nature and constituent parts of the various gases found in coal mines . . . and shall have had five years' practical experience as a miner." In his reports he is to make recommendations for future legislation for safety in mining.¹⁸

Finally, every physician attending a patient suffering from any occupational disease must make a full report to the state board which publishes the results in its annual report.¹⁹ Though a minor provision, it has possibilities and already the reports make interesting reading.

State Board of Health.—Related to the work of the board of labor is the work of the State Board of Health in enforcing the Sanitary Inspection Law.²⁰ This law applies only to shops and factories manufacturing or handling food stuffs and, as the bureau has nothing to do with these shops except so far as they may be located in tenements or lofts, there is not much overlapping in inspection. But, logically, why should not this law be placed under the charge of the State Board of Labor and Statistics, perhaps assisted by the State Board of Health?

The Sanitary Inspection Law, as will be remembered, lays down numerous and definite specifications for the clean-

¹⁷ Code Public Local Laws 1888, Art. 1, Sec. 196, and Art. 12, Sec. 150, as amended by Laws 1902, Ch. 124, and Laws 1916, Ch. 410.

¹⁸ Laws 1916, Ch. 410.

¹⁹ Laws 1912, Ch. 165, Sec. 5A.

²⁰ Laws 1914, Ch. 678.

liness and sanitary condition of factories or shops handling food stuffs and more stringent rules for canneries. It is a most carefully and scientifically drafted law. It may safely be said to be in the highest rank among what may be called regulative acts, a class of laws which, however, is giving way to general laws with provisions for administrative orders. The Maryland law does indeed include a provision for these orders; but, not being absolutely essential to the working of the act, none have been issued. The inspectors of the State Board of Health have, then, for their guidance in the administration of the law the specifications included within the body of the law and nothing else. True, these specifications are rather searching and well-defined, but it is impossible that even the legislature could have foreseen all the contingencies in which the law might be called into play. Accordingly, with respect to details too minute to refer to the Board of Health, numerous disputes as to the interpretation and application of the act must arise. The inspector is thrown back upon his own discretion and the law is strictly or loosely enforced according to the temperament of the inspector. Now it has not been possible for me to interview the employers affected by this law, but from the class of inspectors who are employed by the Board of Health it would seem a fair deduction that the act is administered leniently rather than strictly.

The full control over the administration of this act has been placed by the Board of Health practically in the hands of one member of that board, who has also charge of the enforcement of the Pure Food and Drugs Act. He combines the work of enforcing the two laws and uses the same inspectorial force for both. There are six inspectors scattered over the State. Owing to the fact that their work as pure food inspectors necessitates keeping their identity unknown so far as possible, it is the endeavor of the supervisor to have the same man visit a factory at as infrequent intervals as possible. The inspections are frequent, about four a year, but the continual switching around

of inspectors offsets to a great degree the advantages to be gained from frequent inspections, among the most important of which are the familiarity of the inspector with the plant and his personal amicable relations with the owner. It may be said here that the Board of Health is noted as being of the various State departments one of those least contaminated by politics, and the inspectors may be efficient so far as the Pure Food Law is concerned, in connection with which all the technical work is done at headquarters. An inspector, however, who has no technical training, whose salary ranges in the neighborhood of one thousand dollars, for whom there is little or no hope of promotion, and who has no assurances of permanency of employment, is not one to whom should be entrusted the enforcement of provisions calling for the cleanliness "which the nature of the employment will permit" or the detection of communicable diseases. The act suffers both in the nature of the administration and in the class of inspectors to whom its enforcement is entrusted.

Minor Administrative Agencies.—The Industrial Accident Commission, which is charged with the administration of the workmen's compensation law, may be dismissed with the statement that it is wholly separated from all other labor law agencies in the State. Likewise separated from any other agency is the Baltimore City Commissioner of Health in his performance of the duty imposed upon him to inspect all mercantile or manufacturing establishments in Baltimore City where females are employed to see that seats are provided for these employees²¹—a needless overlapping upon the Women's Ten Hour Law inspection. Similarly isolated and overlapping, the constable of Carroll County inspects the ventilation in stone grinding mills²²—certainly an incongruous agency for the administration of labor laws. Hardly less so, however, are the

²¹ Ordinances of Baltimore, 1910-1911, No. 547.

²² Laws 1894, Ch. 202.

marshals of police or the police commissioners in their inspection of scaffoldings which are reported to be unsafe.²³

Suggestions for Reforms.—All the administrative agencies charged with the enforcement of the Maryland labor law have now been described or mentioned. On the whole there is little less than absolute chaos. One department is fairly well defined, but, on the whole, no more cohesion or system is present than in a pan of peas. And yet the situation is not altogether hopeless. Other States have evolved an orderly administration out of equally or more chaotic labor laws upon a critical expose of that condition. It is hoped that this criticism by merely reporting the results in other States may lead to some such result in Maryland.

The first and cheapest reform needed is some method of taking the personnel of the various departments out of politics. Much has already been said of the disastrous results of the present methods of appointments to all positions in the administration, so that only one instance further will be cited. In 1915 the elections for governor occurred on the second of November and the term of office began on January 1, 1916. A Democratic governor was elected to succeed a Republican. A week after the November election I visited the Bureau of Statistics, as it then was, to interview the assistant-chief. It was only half-past two in the afternoon, yet there was not a single man in the office. All the inspectors were Republicans and knew or thought that they would lose their positions at the first of the year, so they had practically refused to do any work at all.

It is perfectly obvious that some sort of civil service appointment is the prime essential to an efficient administration of the labor law. Whether this shall be by competitive, technical examination or by qualifying, general examination with appointment vested in the head of the labor department is a question somewhat outside the scope of this study. The former has the advantage of securing technically efficient inspectors substantially freed from the taint

²³ Code 1911, Art. 48, Secs. 75-79.

of politics; the latter the advantage of securing all around efficient inspectors who are also more subservient to and often also more agreeable to the chiefs. The competitive examination is perhaps more suited to the present status of labor departments where there is a subdivision of functions and where the inspectors are selected for one purpose alone without much hope of promotion. The qualifying examination is more suited to the centralized system which has been adopted wherever reform has been introduced, where the inspector has various duties to perform in an inspectoral way, where he must be acceptable in appearance and manner to the employers, and where, moreover, as will soon be seen, the appointment is guarded from politics by the nature of the head of the department.

In addition to a civil service appointment, some means must be provided to attract the desirable classes to the positions in the service. We can never in America hope to inspire in our citizens the regard for government service which is present in the German, or perhaps even in the English, heart; but there is no reason why the government service should not be lifted to a higher plane than that which it now occupies. Salaries in the United States compare most favorably with those abroad, so that there is not much room for improvement in this direction without involving great expense. Improvement is needed in respect to the security of tenure, the opportunities for advancement, and the provisions for the disabilities of age or accident. We have referred in the preceding chapter apropos of the Massachusetts state pension law to the value of a pension system for state employees as an incentive to efficient administration; but nowhere in the United States does there seem to have been a proper appreciation of permanency and promotion as essentials in government employment. It is useless to press a priori arguments. In the light of the wonderful success of the English system of government in general, one may demand, in the administration

of the labor law, a graded system of inspectors with promotion for efficiency and permanency of service.

Nevertheless, such a statement of the principles of administration calls for some qualification. There must be considered the inevitable conflict of an independent, bureaucratic administration and a politically responsible administration. Abstract questions would lead us too far afield; so, concretely, should the heads of the various departments be selected absolutely by the governor or should there be promotion from the ranks? As the labor administration is now constituted, it would seem perfectly feasible to vest the selection of the entire force in a civil service board. The only reason for the political appointment of the various chiefs would be to secure uniformity of policy and political responsibility and neither of these is necessary in the Maryland system: the only policy should be an absolutely strict adherence to the terms of the law, and removal of the chiefs for cause by the governor provides all the responsibility which could reasonably be expected. It is perhaps unfortunate that all of these administrative agencies are directly subordinated to the governor and that there is no intermediate state officer responsible for them to the governor, but this deficiency does not invalidate the proposal that as now constituted the labor administration should be entirely divorced from politics. Under the scheme of administration which is now to be described, however, the present heads of departments would be merely chiefs of bureaus who could be efficiently chosen by promotion from the ranks, whereas the head of the unified department of labor, be it an individual or a commission, would be selected by and responsible to the governor. Not only administratively but also politically the centralized administrative system is the more desirable.

What has been termed the centralized administrative system has only recently made its appearance in American labor legislation. Labor legislation in the United States has been a gradual evolution without any preconceived

plan, so that the administrative result has been a hopeless hodge-podge. Under the influence of the movement for efficiency, several States have recently completely reorganized their labor law administrations into logical, centralized systems. This reorganization is precisely what Maryland needs. Civil service reform would work wonders with that vaguely outlined thing which has up till now been termed the Maryland labor department or labor departments, but to obtain real efficiency Maryland should have a true Labor Department embracing all the administrative agencies enforcing laws throughout the State. Such a reform would involve some additional expense, but exactly how much is hard to calculate because there would be a great saving in the elimination of overlapping functions. Such a reform would place some additional burden upon the legislature which initiates it, but, in establishing an administrative system to which the administration of any future labor law might in a few words be referred, it would relieve subsequent legislatures. The investigating commissions in New York and Illinois have recommended reorganization of this kind, and sufficient has been written about it to enable an amateur in administration to suggest reforms for Maryland.

The reorganized Maryland Department of Labor should be presided over by a commissioner or commission appointed by the governor. The head of the department should be the only position filled by appointment. His deputies, if there are any, the heads of the various bureaus, the division chiefs, and the inspectors would be selected by the merit system. In this way the English administrative system would be approximated, that is, a political chief with civil subordinates. If sufficient confidence can be placed in the head of the department, he should be given the power of choosing his subordinates from a list of qualified applicants and this method is especially applicable to the chiefs of bureaus who must have other qualifications than those which can be ascertained by examination. Everything pos-

sible should be done to bring about a condition in which the head of the department will be fully trusted; but, if he is not, appointment to all subordinate positions should be by competitive examination.

The Department of Labor should be divided into six bureaus: the bureau of inspection, the bureau of statistics and information, the bureau of arbitration and mediation, the bureau of mines, the employment bureau, and the industrial accident commission. The bureau of inspection would be the most important of these and it might be feasible in the present condition of the labor law to put in charge of this bureau the Commissioner of Labor himself with the aid of a deputy if necessary.

The bureau of inspection should be divided into five divisions: the division of factory inspection, the division of home-work inspection, the division of mercantile inspection, the division of steam boiler inspection, and the division of industrial hygiene. It may be objected that this subdivision is too minute for present conditions in Maryland. To a certain degree the objection is valid: some of the divisions may have little to do and one man may be sufficient to fill them. This plan, however, is not to meet present conditions only, but is to furnish a basis for all future labor legislation, and we may be sure that future labor legislation will be quantitatively greater than in the past. One of the first duties of the legislature after reorganizing the administration should be to make some of the local laws state-wide, for in the main they seem to have been enacted locally because of the lack of state-wide administrative agencies. Now the inspectors in the factory, home-work, and mercantile divisions will all enforce practically the same laws. The divisions will be upon the basis of places inspected instead of laws enforced, and every inspector will be authorized to enforce any law which is applicable to the establishment which he is visiting. Moreover, entire authority to enforce the laws must be centralized in the Labor Department and all reference to local authorities must be

discontinued; the Labor Department must be made self-sufficient. Thus practically all overlapping will be eliminated.

Of sufficient importance to be entitled to special mention is the division of industrial hygiene, copied from the New York division of the same name.²⁴ It is what is popularly known as a bureau of "theorists," a bureau of technical experts, being composed in New York of a physician, a chemical engineer, a mechanical engineer who is an expert in ventilation and accident prevention, and a civil engineer who is an expert in fire prevention and building construction. The duty of this division is to make inspections of a highly technical nature, to make independent investigations upon which laws and orders may be issued, and to serve as general technical advisors to the department. This is an expensive division, but it is a most valuable one. It would be well if Maryland could copy the New York plan in its entirety, but that is not a necessity. To begin with, Maryland would need at least one physician to supervise the issuing of child-labor permits and the inspection of food-producing establishments. The mechanical engineer would be a valuable adjunct to the Industrial Accident Commission and the State Insurance Fund.

The other bureaus are less important. The bureau of statistics and information should have the same functions that that bureau originally exercised; it should be the publicity bureau of the department. The bureau of arbitration and mediation should have the enforcement of the law which is now entrusted to the State Board of Labor, together with the enforcement of any more efficient law which might be enacted. The bureau of mines should be charged with the enforcement of the mining law in the western counties. The bureau of employment should be charged with the establishment of free employment offices and the licensing of private employment offices. The In-

²⁴ New York Consolidated Laws, Ch. 31, Art. 4, Sec. 60, as amended in 1913. Laws 1913, Ch. 145.

dustrial Accident Commission, which has been placed as the sixth bureau in the Labor Department, should hold a relation to the department entirely different from the other bureaus. For a number of reasons it is advisable that there be some connection between this commission and the rest of the department; but, owing to the importance of the commission and the class of men who are necessary for the adequate administration of the compensation law, it is doubtful if the commissioners should be made more than nominally subordinate to the head of the department or if they should be chosen in the same manner as are the chiefs of the other bureaus. This is a practical question calling for fuller discussion than can be given it here.

The question whether the administrative head of the Department of Labor should be an individual or a commission has been complicated in most States where reorganization has taken place by questions of legislative policy. Most of these States have enacted general laws, with delegated authority to issue specific orders, to take the place of the detailed and intricate laws on their statute books. Enough has already been said of the advantages of this mode of legislation both from the substantive and the administrative standpoint. From the point of view of administration, the elimination of all discretion in the individual inspector and the substitution of the educational, helpful attitude for the antagonistic, prosecuting frame of mind are advantages so manifest as to be undeniable.

For purely executive work, a one-man head is most desirable, but if the head of the department has ordinance powers some sort of commission is a logical necessity. Up to the present time there have been devised four forms which this commission might take. In the first place, the Wisconsin plan places all the power, executive as well as administrative, in the hands of a commission of three, an excellent plan in most respects, but it has not been followed and has been much criticised because of the weakness inherent in the division of executive authority. The second

plan is the New York scheme adopted in 1913 under which there is a single executive head, the commissioner, and an advisory board of representative men and women not subordinate to, but presided over by, the commissioner, which is empowered to draft orders. The objection urged against this plan is that which is urged against all part-time boards, the objection of inefficiency. In the third place, a slight variation of the New York plan is advocated, the single executive head as before, but a commission composed of the chiefs of bureaus. This is open to the serious objection that it confers independent advisory and discretionary functions upon officers who are administratively subordinate to the head of the department and who are, moreover, civil service appointees with technical proficiency, but hardly legislatively representative. The final plan is that advocated by the Illinois Efficiency Commission of 1914. This retains the single commissioner and associates with him two deputies, free from executive duties and of equal rank with the commissioner so far as ordinance power is concerned. Aside from the possibility of friction, the overwhelming objection to this scheme is the useless multiplication of officers for an administration the size of Maryland's.

On the whole it would seem that the New York plan, which has been adopted in a modified form by the 1916 amendment, is best adapted to the needs of Maryland. Besides the commissioner, the board is composed of four members, of whom it is advisable that one should be an employer of labor, one a wage-earner, one a physician or sanitary engineer, and one a woman. All of these offices should be filled by appointment by the governor and the salaries should be large enough to be attractive to the worthy and the influential. For the conduct of its business the board should meet once or twice a month at the call of the commissioner. Besides the work of formulating administrative ordinances, the commissioner should lay before the board all matters in which any policy or discretion is involved, except as the exigencies of a particular case may call for

immediate action. The board should also have some advisory power in the choice of subordinates, if these are selected from a qualifying and not from a competitive examination. In general, however, except in the matter of formulating ordinances, the board should be merely advisory to the commissioner, for administrative responsibility must be centered in one man and, in the last resort, the commissioner himself must be directly responsible to the governor. Centralization and discretionary power must always be balanced by responsibility.

This brief outline I have built up almost entirely independently of the 1916 reorganization of the Maryland labor administration, the form of the head of the department and the centralizing idea being the only similarities. I have been forced to do this for the reason that the 1916 amendment, although a good beginning, failed, like all previous legislation, to take a large and comprehensive view of the situation. As has been said, by failing to go all the way it failed to realize many of its possibilities. Instead of looking to the future, the legislature only strove to correct some of the defects of the past, and accordingly future legislatures will have almost as much difficulty in attaching new duties to the state board as it did to the old bureau. The plan presented in this chapter is based upon scientific investigations conducted in the most advanced States; and while no scheme can be unalterable, this one has been elaborated with as much prevision as mankind is capable of.

CHAPTER VIII

THE STATE IN RELATION TO LABOR

It seems rather preposterous after the description of the administration of the Maryland labor law given in the last chapter to repeat what was said in the first chapter, that Maryland is an average American State so far as its labor law is concerned. Yet calmer consideration will justify this statement. The administration, it must be admitted, is inferior, though the system of administration which is provided by statute might be made comparatively efficient. Equally poor are the safety and sanitary inspection laws with the exception of the recent sanitary provisions for food manufacturing establishments. Slightly better are the laws regulating the terms of employment of adult men, though, it must be remembered, these laws have far from justified their enactment. The other provisions of the labor law are above the average. The child labor law and the workmen's compensation law, though perhaps capable of improvement, are really exemplary pieces of legislation. The industrial disputes act and the other laws relating to the labor union are almost as good as could be hoped for. The women's ten-hour law ranks lower than similar laws in many States, but nevertheless Maryland is above the average. The non-statutory law of the labor union, while not ideal and not even satisfactory under present conditions, is in absolute accord with the best legal thought.

In spite of the fact that Maryland deserves such a rank, a general survey of the labor law is likely to be most disappointing. The labor law considered as a whole displays the same lack of system that was evident in the administration of that law. The legislature churns out haphazardly all kinds of labor law and when the student tries to unearth

some maxims or some philosophy upon which the legislation is based, he is met with absolute chaos. Not only is this chaos present in the legislative enactments, it is also only too evident in judicial decisions. Now, we could perhaps excuse the legislatures for this deficiency, for as our state legislatures are now composed, it is hardly to be expected that they will have any continuous policy of legislation in any branch of state activity; and, in respect to the labor law, they respond to the demands of their constituents just in proportion as the proposed measure seems a good vote-getting device. But the courts which exercise a great influence upon all social legislation through their power to declare laws unconstitutional have no such excuse. They have endeavored in some cases to throw the blame for reactionary decisions upon the counsel who argued before them,¹ but this excuse—to use their own language—though perhaps evidence of extenuating circumstances does not detract from the weight of the offense.

When I say that neither the courts nor the legislature act upon any consistent philosophy of labor legislation, I am, in one sense, not speaking with strict accuracy. The legislatures do still act as they always have acted upon the theory that laws which are strenuously demanded by a great number are desirable, and the courts have formulated a maxim that legislation must be for the welfare of the general public and not of a particular class. Neither of these principles, however, is specific enough as a basis for legislation. More concretely the courts from time to time have acted upon the principle that those labor laws are proper which tend to equalize the bargaining powers of labor and capital or upon the principle that the legislature should only enact laws safeguarding the public health, morals or safety; but neither of these principles has been iterated consistently enough to be called a philosophy of the courts. There is, then, in labor legislation only the philosophic principle of individualism

¹ See *Ritchie v. Wayman*, 244 Ill. 509; *People v. Schweinler*, 53 N. Y. L. J. 81.

dating back to Jeremy Bentham as modified by present conditions in the direction of state intervention. But when it is remembered that the exceptions to the individualistic principles are more numerous than the rule, that the tendency is towards state intervention and away from *laissez-faire*, it will be obvious that some limitation upon state action is necessary unless individualism is gradually to change to socialism. There has as yet been formulated by legislature or court no such limiting principle and the result is a confused and chaotic mass of labor laws obeying no definite rule of the relation of the state to labor.

In attempting to outline any system of philosophy of labor legislation, we must, to conserve energy, use as many principles of existing theories or systems as is possible. Not only does such a plan conserve energy, but it also commends itself in lending greater plausibility to the new scheme. Before outlining our scheme, therefore, it will be necessary to extract the best points from the two prevalent philosophies of state activity, *laissez-faire* and socialism.

Laissez-faire, as has been said, is the philosophy of complete inactivity on the part of the state. Realizing the value of individual initiative, the believers in *laissez-faire* advocated the absolutely unrestricted development of this virtue. So sure were they of the efficacy of this quality that they were content to conceive the welfare of the state as merely the sum total of the welfare of the individuals composing it. Now the philosophy of individualism is sound in so far as it accentuates the necessity of individual initiative and this is the element which we must try to preserve; but experience soon proved that its corollary of *laissez-faire* was an impossible solution of the relation of the state to labor. *Laissez-faire* exalted competition with a hope of weeding out the unfit, but the result was a competition between classes which must function together if they are to attain the greatest common good. Instead of competition weeding out the unfit and raising the standards of social and industrial life, unregulated competition lowered

the standards to the basis of those of the lowest competitor. Not only did the individual suffer, but the community and the state were also hurt by this rampant selfishness. And the state suffers both from the individual suffering of its citizens and from the torpidity which this philosophy forces upon it. Individual initiative should be fostered, but selfishness must be carefully repressed.

As a reaction against this theory of the relation of the state to its citizen, there came into being the political philosophy of socialism. This philosophy, as I view it—and there are almost as many views of socialism as there are socialists—is the result of the theory that thinking men “no longer hope for salvation through ‘the free play of individual interests,’ and ‘freedom of contract’ . . . they are apt to identify the cause of liberty with a policy of social injustice. . . . The real test of liberty is to be found less in the form of government or in the number of laws that control the action of the citizen than in the extent to which the citizen is assured the means of self-realization.”² So far again we may accept the tenets of this theory, but the complete socialistic program of state activity goes on to advocate at the least the socialization of all the means of production. That is, socialism in opposition to laissez-faire believes in the most intimate intervention of the state in the life of its citizens, intervention extending as far as state control, if not ownership, of all the factories, land, transportation, and other productive agencies. Socialism by the logical development of its fundamental tenet departs quite as completely as does individualism from its original concept. Socialism in endeavoring to assure to the citizen the means of self-realization by a complete system of liberty-making restrictions ends by completely stifling individual initiative. This in the last analysis is the real argument against socialism; it involves the rule of a bureaucracy in political and industrial affairs, a superabundance of laws which inevitably tend to deteriorate in quality as they in-

² W. Jethro Brown, *Underlying Principles of Legislation*, p. 57 ff.

crease in quantity, and a too frequent interference of the administrative powers of the state in the life of the citizen—all this at the expense of a proper encouragement of the vitally necessary individual initiative. If a socialism could be conceived which would preserve this one quality, it would be desirable in spite of its other faults; but so far no such conception has been formulated.

We can then begin our constructive philosophy upon these two fundamental ideas which have now received rather general acceptance, the ideas that individual initiative and self-realization must be stimulated and that a proper use of legislation can be made to contribute to this end. Individual initiative is essential to progress, but individualism untempered by state interference is an impossible principle. The state must interfere when individualism fails to achieve the greatest common good; but the state should interfere as rarely as possible, state intervention should be always the secondary consideration. As Schäffle says of the need of state intervention in the protection of labor: "It [the state] only steps in when self-help and mutual help, supplemented by ordinary state protection, fail to meet the exigencies of the situation, whether momentarily and on account of special circumstances, or by the necessities of the case."³ The state's policy of intervention should be not only temperate, but as far as possible uniform. That is, the state should not manifest itself too variously in differentiated classes of laws, but should strive to specialize its activity. One of the causes of the failure of socialism is that the state is called upon to attempt duties too diversified. The state promotes individual initiative most effectively by confining itself as nearly as possible to its prime duty of policing, and all its activity should be closely related to this fundamental activity. Its legislation to make real the theoretical liberty which the laissez-faire philosophers believed in should be legislation which really makes the individual capable of caring for him-

³ Schäffle, *Labor Protection*, p. 11.

self, not legislation which attempts to take care of the individual.

With these fundamental principles in mind, let us consider the existing labor conditions. We have traced in the first chapter the varying development of the theories of labor law and it was pointed out that not until the last period of this development, the period of laissez-faire mitigated by legislation in favor of the laborer, was the labor problem serious enough to merit activity upon the part of the state purely in solution of this problem. Moreover, it was there also shown that this last period dated from soon after the Industrial Revolution. These two facts are not chance concomitants; they have a real relation to the problem. Prior to the Industrial Revolution, the employer and employee were in intimate personal relation to each other. The employer employed few men and usually did part of the manual labor himself. He usually knew the conditions of these men and took an interest in their welfare. Moreover, the men were able to bargain successfully for their own welfare, for the employee had almost as many shops in which to seek employment as the employers had occasions to employ workmen. In other words, the business unit was so small that the individual employer had no greater monopoly of jobs than the employee had of working ability. After the Industrial Revolution, however, one employer employed hundreds and thousands of workmen. Not only did he have greater experience in hiring labor than the employee had in seeking work, but because of the magnitude of his business he had more of a monopoly of the jobs obtainable. Briefly, the employer had what the employee wanted most of all—work; he usually was not hard put to it to get what the employee had—labor; he was in a superior economic position and had more experience in making the contract of employment. The individual employee was practically at the mercy of the employer; the employer set the conditions of employment and the employee was compelled to acquiesce in them.

As an offset to this inequality of bargaining power, the workman evolved the old craft gild into the labor union. By thus combining the individuals in a particular craft into an organized whole and developing one of the members into a trained bargainer, the employees were able to balance the monopoly and the experience of the employer. Collective bargaining for the whole union was substituted for the individual bargaining of the single employee. But this solution has not been adequate. It was because unionism was incomplete, however, not because it was ineffective, that the state was compelled to legislate. The state soon discovered that it had to interfere in the labor contract; absolute laissez-faire was not feasible under a factory system of industry and an unorganized community of laborers. The more powerful employer, it was found, used his power selfishly to the detriment of the state. The state recognized the inequality of the bargaining power of the two parties to the contract and stepped in to remedy the effects of this inequality. Would it not have been better to have remedied the inequality? If the state, instead of establishing certain of the terms of the labor contract, had made the employee capable of establishing these terms for himself, its task would have been much simplified. If the state had legislated to make equal the bargaining power of the two parties, if the state had legislated to encourage the development of collective bargaining, it would have effected perhaps, not a panacea, but a much greater reform than any law so far has effected. A really strong labor union as a means of collective bargaining would render unnecessary much of the ever-increasing bulk of social legislation. To achieve unionism should be the first aim of state activity.

Experience sustains this conclusion. The well-organized—I might even say the organized—labor union asks little of the state except legal recognition and the absence of legal persecution. It is perfectly reliant upon its own powers. Through its control of labor and its own resources, it is enabled to withstand the natural ascendancy of the em-

ployer and bargain through its trained agents for its fair share of the product. It is within the scope of the union's power to bargain as to hours of labor, wages, days of rest, conditions of apprenticeship, etc. The trade union as a fraternal organization can provide for out-of-work benefits, sickness insurance, old-age pensions, and the like. What is more important, the labor union can better care for the terms of the employment of its members through its bargaining with the employer than the state could through legislative enactment, for the labor union can better recognize the local and incidental variations of each trade and better provide for them in its terms than could the state. Thus the English textile workers in conjunction with the employers maintain expensive experts to arrange sliding scales of wages and hours to conform to various conditions and to fix new terms when new conditions arrive.⁴ And, furthermore, with respect to the benefits, the union is able to provide more efficient administration than the state could because of its more intimate connection with the recipients of the premiums. Together with the strength and numbers of the central and federal unions, these organizations provide a much subdivided and minutely classified administrative device for the amelioration of labor conditions. This must be considered an additional argument for the policy of noninterference, which indeed weighs very heavily in conjunction with individualistic reasoning. In these fields which have just been discussed the labor union can be perfectly efficient, but in order to be efficient, it must contain practically every worker in its trade, perhaps an entirely impracticable condition.

The labor union, however, even in its strongest condition is not able entirely to replace the state in looking after the welfare of the laborer. Certain laws must still be enacted. The state must, of course, legislate with reference to the labor union itself. The union naturally must be legalized

⁴ See Webb, *Industrial Democracy*, for a description of this scheme and for an appreciation of its workings toward amicable relations between labor and capital.

and, as will be seen, aided in some manner before it can begin its function as efficient competitive bargainer, for the common law, especially as affected by early English labor legislation, is not friendly to labor unions. In other respects, also, amendment of the common law will be necessary to conform this inelastic system to changing industrial conditions. The workmen's compensation movement is a present instance of this branch of state activity. The labor union could inaugurate schemes of accident insurance and some unions have done so; but under the common law of master and servant a scheme of accident insurance would, in a great majority of industries, become most expensive. The state alone can abrogate the doctrine of assumption of risk and fellow-servant negligence and ameliorate or abrogate the theory of contributory negligence. Most important is it that the labor union should bargain for and help to regulate the conditions and environment of employment. Certain minor provisions, of course, the unions will always stipulate for, but conditions of sanitation, fire-prevention, and safety appliances are beyond the scope of their powers. In the framing and enforcement of such provisions expert knowledge beyond the reach of unions is necessary; and, moreover, in the fundamentals, a uniformity must exist which higgling and bargaining from their nature never can procure. Within these three rubrics, then, the legalization of the union, the correction of the common law, and the regulation of the conditions of labor, the activity of the state should be contained; beyond them is the sphere in which the state should act only in aid of the union and in furtherance of its schemes. In this way, as I see it, could individual initiative be encouraged and the state care best for the general welfare. This, in other words, is an ideal system of state activity.

Accepting provisionally this assumption, the possibility of which will be later demonstrated, that labor is fully organized, that indeed each union has a practical monopoly of the workmen in its trade, the question presents itself:

Will the unions become so strong when they have once been brought into power that they will not only control the capitalists and become the first claimants in distribution, but that they will set up a kind of inverted autocracy in which the union leaders represent their class to the entire emancipation of the capitalists? Such a result seems somewhat fantastic, but the recognition of its probability leads to profitable speculation.

In the first place, even assuming that the great proportion of laborers are unionists, the place of capital in the economic and social system would still be an important one; and, unless communism followed unionism—and this does not seem probable or even logical—the class of capitalists would be separate from and necessary to the workingmen. Moreover, when unionism is at its highest point, from one-third to one-half of the working population, farm laborers, professional men, and the like, are engaged in pursuits in which unionization is impossible or unnecessary. And it must be remembered that the unorganized portion of the population will still include the professions, the brains of the country. But, in all this discussion, that which must struggle for completion is recognized as in full bloom before any resistance or restriction is organized. Of course, this is inconceivable. With the advent of fully organized labor, there will develop organizations of employers after the nature of the present employers' associations to combat the rising menace to their profits. No government aid will be needed to help them into existence and the law will hardly antagonize them as union combatants so long as they restrict themselves to agreements concerning labor. These employers' associations will also approach to a monopoly, a monopoly of jobs, and there will be then on opposite sides two aggressive organizations, each seeking for its members the larger share in distribution. A battle under those circumstances is inconceivable. On behalf of the consuming public, the state would step in to effect control over those large labor questions whose inci-

dental variations it had left to the labor union. In other words, some form of mediation, arbitration or conciliation is necessary.

It is out of place here to enter into any detailed discussion of the modes of amicable settlement of labor disputes. The plan called for here is some kind of a government commission with the powers of one of the present minimum wage commissions to settle all questions of terms of employment which the agents of the labor union and employers' association cannot agree upon. The necessity of appealing to this commission and accepting its awards may, if necessary, be made compulsory and binding upon the acceptance of government aid by the unions. Constitutional objections will be raised, but we must sometimes remember that the constitutions are not the last word in social legislation and social readjustment.

There are, however, certain practical questions which have been slurred over in the previous discussion, but which must now be considered in all their glaring baldness. It is, indeed, one of the drawbacks of philosophizing and theorizing that practicalities always constrain one to justify his theories. Perhaps that is why there is such a paucity of theories in the world and so many "practical men."

In the first place, then, it has been assumed that, in order to guarantee to the state its proper place in the amelioration of social conditions, labor has become completely organized. "The success of a union in enforcing its demands depends upon the extent to which it has control over the labor supply in its particular occupation, since, if an employer is easily able to fill the places of those on strike, it is evident that the whole movement fails in its purpose."⁵ It has been calculated, however, that only between five and six per cent of the workers of the country are organized, and that few unions control half the laborers in their crafts.⁶

⁵ Weyforth, "Organizability of Labor," in Johns Hopkins University Studies, ser. xxxv, no. 2, p. 146. Much of the following has been suggested by this monograph.

⁶ Wolman, *Extent of Organization in the United States*, MS.

These figures, however, exaggerate the problem confronting us, though they do suggest its magnitude and, perhaps, the fancifulness of the project. One of the greatest difficulties in the way of organizing laborers is the opposition of the employers to unionization. This is a natural phenomenon of competition, but it seems a passing one. Its most destructive opponents are public opinion and the growing consciousness among employers that it is to the benefit of each employer to have all the workers in his trade organized. For only then is the employer sure that his competitor is not undercutting with cheap labor, and his care is to obtain relative, not absolute, cheapness in the elements of his product. This problem, however, will find its own cure; legislation in its nature follows as well as develops public opinion. The country when willing to accept the scheme of legislation here set forth will present a concerted opinion strong enough to offset the opposition of the employers to unionization.

A more serious problem confronting the organizer of labor, from the point of view of this study, is the apathy of the laborers. This manifests itself in two forms, in the apathy of the individual worker in an organized trade and in the apathy of a whole trade resulting from the nature of the trade. The indifferent worker is a problem for modern unionism which the unions of today are fast learning to handle successfully; but, in the eyes of a scheme which would only succeed through a general appreciation of the union as the natural, fixed economic phenomenon which it seems to be, this problem sinks into insignificance. The really serious difficulty is the apathetic trade, the trade which seems impervious to organization. The unskilled, floating workers because of their great number and the aimlessness of their interest, the women in employment because of the transitoriness of their employment and because they look to marriage rather than wages as a means of livelihood, and the home-workers because the scattered condition of the employment makes enforcement of union

regulations well-nigh impossible are the black sheep of labor unionism. That a stimulating impulse is the necessity in the case of the unskilled and the women, that these classes are not impossible, but merely difficult to organize, is demonstrated by the success of such unions as the stevedores and hodcarriers and of the New York garment workers' protocol. The home-workers, if the law is content that there be home-workers, seem conclusively without the field of unionism. The isolated conditions of employment, the private nature of their occupation, make impossible such union regulations as an eight hour day, standard wages or a closed shop. But this is not fatal to the argument that the unions should regulate the terms of employment, for the same conditions would make equally impossible an efficient state regulation of these terms. Except as to the conditions of the environment of employment, which under any scheme of social legislation must come under state control, the home-workers are incapable of outside regulation.

Another class of workers who are not well organized are those who labor in small one-man industries. These include farm laborers, domestic servants, workmen in small country shops, and the workers in the so-called one-man shop. The organizing condition of these employments is analagous to that of the home-workers, but it is not absolutely incompatible with organization, as is evidenced by unions of barbers and the like. The labor problem, however, in these industries is not so acute as in the larger centralized employments, for the laborer is in intimate relation with his employer. In fact, these occupations are quite of the nature of the early forms of industry when no labor legislation was enacted, and even today these occupations are often omitted from labor legislation. Instead of enhancing, these workers may be said to mitigate our problem.

The problem then is, if it is desirable to make the greatest possible use of labor unions in the amelioration of labor conditions and if it is desirable to establish a limit to state intervention where the concerted action of the workingmen

shall work out their own salvation,—the problem then is to secure almost complete organization among laborers. Because of the antipathy of the employers and the apathy of some laborers, as explained, the organizability of labor seems to stand at a rather low level. Public opinion, it is true, plays a large part in determining the level at which the labor barometer stands, but public opinion cannot overcome all the obstacles in the way of labor organization. Active help must be furnished from the outside. It is here that the state may bargain for the controlling interest in the manipulation of trade union affairs which is necessary to amicable settlement of industrial disputes. Two modes of state aid will illustrate the kind of help necessary and the problems involved, but the exposition of these two schemes must not be accepted as exhaustive of the methods of state aid.

The first plan for state aid is in the nature of financial encouragement. One of the main weapons of organization is the beneficial system of trade union insurance. Not only is this an effective lure to the conservative workman, but it is one of the chief inducements to permanent organization when the initial stimulus of a successful strike or boycott has spent its constructive force. Two of the most important of these benefits are out-of-work and sickness benefits. The state could contribute to one of these and make the union so much more effective by its aid.⁷ As a condition of this contribution, the state could stipulate that through

⁷ The expense of this scheme would not be great. Taking as a typical example of the source of state aid, the State of Maryland, a fair estimate would be the addition of three and one-fifth cents to the tax rate. This estimate is arrived at in the following manner: The working population of Maryland is 541,164 (Census of 1910, Vol. V, p. 111). Deducting 222,247, the number of farm-hands, proprietors and professional men, etc., the total number of organizable workers at a generous estimate is 318,917. The average per capita cost of out-of-work benefits in two unions, the Cigar Maker and Typographic, from 1900 to 1905 was \$3.55 (from tables in Kennedy, *Beneficiary Features of Trade Unions*, p. 91). If the State should contribute 30 per cent of this amount, again a most liberal estimate, the total cost for Maryland would be \$329,647 or 3.2 cents on the tax assessment basis of 1914.

its commission or board of arbitration or some similar board, it should have intimate control over the affairs of the union. This scheme would have to meet the objections against all state insurance schemes; and it could meet them rather effectively; but none of these, because of the nature of this discussion, is important to dwell upon except the question of constitutionality, that bugaboo of all social legislation.

Under existing state constitutions,⁸ this method of state aid would be illegal; but most state constitutions are easily and often amended so that the real difficulty lies in the relatively staid Federal Constitution. The "due process of law" clause interpreted as forbidding state taxation for private purposes and the "equal protection of the law" clause of the Fourteenth Amendment as usual raise their threatening forms in the path of this legislation. In the first place, would such a system of state contribution to union benefits involve taxation for a private purpose?

The first ground upon which this legislation would be sought to be upheld would naturally be as an extension of the proper state function of poor relief, for, in taxation cases, the courts lend most weight to the historical argument. It might be argued that, inasmuch as the State may relieve its poverty-stricken citizens, it should be enabled to grant aid as a preventative of those conditions. Now the two kinds of contributions, of which one is advocated, are both directed against prime causes of poverty, the sickness or unemployment of the wage-earner of the family. The argument is perfectly sound that an ounce of prevention is worth a pound of cure, but the majority of the courts of the country have refused to be guided by this proverb.⁹ State relief, it has been generally held, can only be granted to those absolutely indigent. At least one court,

⁸See, e. g., the Maryland Constitution, Art. III, Sec. 34: "The credit of the State shall not in any manner be given . . . in aid of any individual association or corporation."

⁹See Goodnow, *Social Reform and the Constitution*, chap. 7, and cases there cited.

however, has taken the logical, if not the historical and legal, position just set forth and has upheld a preventative measure;¹⁰ but, except as an entering wedge, this opinion lends little encouragement because of its uniqueness.

Driven from this ground by the conservatism of the courts, it is more profitable to consider whether the State is not obtaining for itself by indirect means a perfectly valid advantage. "It is obvious that what is a public use frequently and largely depends upon the facts and circumstances surrounding the particular subject matter in regard to which the character of the use is questioned."¹¹ It is useless to quote cases. The irreconcilable differences of the opinions makes it possible to quote in favor of either position. Let us then appeal to reason. By making the nominal expenditure for beneficiary payments, the State saves itself the cost of expensive commissions and experts necessary for the efficient administration of this part of the labor law, saves its legislators endless trouble by rendering unnecessary a great multitude of enactments, and exercises an interest of utmost importance in maintaining amicable relations between employers and employees, in preventing labor wars. The state takes this means of legislating with respect to the fundamentals of the labor question instead of striving to correct the deformity of modern industrial life by attacking merely the symptoms and outgrowths of the inequalities now existing between labor and capital. The State, it would seem, has a right to legislate in this manner and "it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use."¹²

This line of reasoning also makes unnecessary any extended reference to the "equal protection of the law" clause. All unions and unionists will receive similar aid

¹⁰ *North Dakota v. Nelson Co.*, 1 N. D. 88.

¹¹ *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112.

¹² *Noble State Bank v. Haskell*, 219 U. S. 104, and cases cited.

from the government, and everybody will be able to secure this aid by entering a union, for, in fact, to secure complete organizations is the prime motive of the aid. The unions, through governmental insistence, must hold themselves open to receive any worker having the qualifications of the trade; and the State must stand ready to extend its aid to all unions coming into existence. All who unionize receive government assistance and those who refuse to organize have themselves to blame. The discrimination between unionists and non-unionists, in reality, amounts to very little, and this discrimination is justified by the end to be attained.

As a second mode of state encouragement to organization, a scheme lending actual assistance to the establishment of a preferential union shop in the several industries is suggested. Little argument is necessary to prove that if actual preference is given to the man bearing union credentials in obtaining the open job, great advantage is given to the union. It would, perhaps, be too difficult to attempt to absolutely enforce a closed shop or even a preferential shop by legal enactment, but any aid in this direction would be beneficial, and perhaps sufficiently beneficial to stimulate organization among the apathetic workers, certainly beneficial as a weapon against the antipathetic employers. It is not necessary to suggest a typical law, but it would be interesting to consider the constitutionality of a law similar to that which has been passed in several States penalizing the discharge of a workingman because of his membership in a union or penalizing an employer for insisting upon an agreement from the worker not to join a union during his employment, either of which would be enforced only as to unions submitting to government intervention in their dealings with the employers.

At first glance, either of these laws would seem clearly unconstitutional under decisions of the Supreme Court in the *Adair*¹³ and *Coppage* cases;¹⁴ but there is one new

¹³ *Adair v. United States*, 208 U. S. 161.

¹⁴ *Coppage v. Kansas*, 236 U. S. 1.

feature, government control, introduced which will at least weigh in the direction of constitutionality, and, moreover, it is most deferentially submitted, the decisions in these two cases are open to criticism. Both of the majority opinions in these cases were written by the conservative, if not the reactionary, justice of the bench and both of them are reasoned out upon eighteenth century notions of the inviolability of natural rights. The Court does not take judicial cognizance of twentieth century conditions as affecting these eighteenth century rights. It lays aside as immaterial the practical inequality of the employer and the unorganized worker and sees no possibility of coercion in the mutual employment agreements. "But in view of the relative positions of employer and employed," asks Justice Day in his dissenting opinion in the later case, "who is to deny that the stipulation [not to enter a union during employment] here insisted upon and forbidden by law is essentially coercive?" It is useless to attack at any greater length these decisions; the dissenting opinions are stronger than anything else which could be written. The proposed laws, however, can be held constitutional in spite of these two cases. Not only would the State be attempting to aid the unions by these laws, it would be fulfilling a purpose of its own in the amelioration of inequitable labor conditions and in the amicable adjustment of labor disputes. The unions would take on the nature of public institutions; and, as the Court says in the *Coppage* case, "if they were, a different question would be presented" than the one there considered.

These two methods of state aid are, then, illustrative of the kind of legislation needed to consummate the idealized condition of affairs herein assumed. To encourage individual initiative and to repress selfishness in a proper proportion, so that both the individual and the community may prosper, the State's first duty in labor legislation is to stimulate unionization. Until complete unionization is attained, the State may have to legislate in fields beyond

those to which this system would limit it; and in those fields the previous chapters of this study have sought to lay down sound standards of legislation. When, however, unionization is once complete and with it have come into existence the employers' associations, the State will be able to leave most of the terms of the labor contract to the two parties, itself intervening through the agency of the governmental commission only on the rare occasions when the public welfare seems at stake. The only other care of the State will be to keep the unwritten law up to date and to legislate concerning safety and sanitary conditions. Perhaps this outline seems too ideal, but in that it is like all logical philosophies—when they become constructive they necessarily go to extremes and extremes are not reasonable; only the mean is reasonable and that is not logical.

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SOCIETY 1817-1840

BY

EARLY LEE FOX, PH.D.

Professor of History in Randolph-Macon College

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PREFACE

The following study was undertaken at the suggestion of Professor John H. Latané, of the Johns Hopkins University. It is a genuine pleasure for me to acknowledge and express my thanks for the interest he has shown at every stage of the work. As a result of his instruction, together with that of Professor J. M. Vincent, also of the Johns Hopkins University, I have come to appreciate, I hope, the importance of a critical evaluation of historical evidence. My thanks are also due those connected with the Manuscripts Division of the Library of Congress, where most of the research work was done, and particularly to Mr. Fitzpatrick, whose courtesy I shall not soon forget. Rev. M. L. Fearnow very kindly read a portion of the manuscript and suggested several changes.

E. L. F.

THE AMERICAN COLONIZATION SOCIETY

1817-1840

INTRODUCTION

It is just a century since a group of men of distinguished talents came together in the city of Washington for an interchange of views on the solution of the negro problem. The result was the organization of the American Colonization Society. From the time of its inception the Society appealed to men in every walk of life and from every section of the Union. The whole movement was in response to a national, not a sectional sentiment. From the day of its birth to the day when, by the proclamation of the president, the slaves in the South were set free, leaders of thought and framers of national policy looked to this organization to save them from what Jefferson had called the fire bell in the night.

Between the Missouri Compromise and John Brown's raid there were few platforms upon which representative men from New England, the West, and the upper South could stand and discuss dispassionately the negro problem. But upon the platform of the Colonizationists they could, and did, stand. On that platform stood Daniel Webster of Massachusetts and William H. Crawford of Georgia, Elisha Whittlesey of Ohio and Theodore Frelinghuysen of New Jersey. There Elijah Paine, that distinguished farmer, jurist, and philanthropist of Vermont, could, in common with his neighbor, Roger M. Sherman of Connecticut, talk with the owner of three hundred slaves, William H. Fitzhugh of Virginia. There stood Francis Scott Key, Charles Fenton Mercer, John Marshall, and James Monroe. There the author of the Olive Branch made common cause with

the editor of the *North American Review*. There James Madison, the father of the Constitution, was of the same mind as was Abraham Lincoln, who stood as the guardian of a national spirit which that time honored instrument had done so much to create.

The organization of the Methodist Church was rent in twain over the question of slavery; but Bishop Beverly Waugh, of the Methodist Episcopal Church, was a Colonizationist in common with Bishop John C. Granberry, of the Southern Methodists; and these made common cause with Bishop Clark of Rhode Island and Bishop Meade of Virginia, both of the Protestant Episcopal Church. Waldo of Massachusetts, and McDonogh of New Orleans, contributed many thousands of dollars for the cause. Presidents McLean of Princeton, Duer of Columbia, Day of Yale, Everett and Sparks of Harvard, were all Colonizationists. Richard Rush, John Eager Howard, Henry Rutgers, John Taylor of Caroline, General George Mason, General Walter Jones, Robert Ralston, Benjamin F. Butler of New York, John Tyler, Henry A. Wise, J. J. Crittenden, Abel P. Upshur, M. C. Perry, and Levi Lincoln, men who thought differently along many lines, all supported the colonization movement.

The decade, 1830-1840, witnessed the development of large areas of the Southwest, and with the economic change came a fundamental change in the point of view of the South toward slavery. Professor Dew's contribution in the "Pro-Slavery Argument" is indicative of a lamentable change that was coming over the mind and conscience of the South. If ever, during the nineteenth century, conditions in the United States called for the leadership of men of foresight and moderation to set forth convincingly the evils of the system that was getting its hold on the South, that time was 1831 and the ten years following. The Colonizationists, both Northern and Southern, attempted to provide just such men and just such leadership. It was with the secret cooperation of the American Colonization Society

that Jesse Burton Harrison, a native of Virginia who was then living in New Orleans, contributed to the *American Quarterly Review* his "Review of the Slave Question," which was intended to counteract the undoubtedly great influence of Professor Dew's argument. Harrison appealed to the Southern States, and particularly Virginia, to throw off that greatest hindrance to economic development. What would have been the result if such a campaign as that begun by Harrison had been allowed to go on unobstructed for a decade or a generation it is not possible to say; but that this was precisely an important part of the program of the Colonizationists will appear in the pages which follow.

To look upon the American Colonization Society as an organization whose success is to be measured solely by the number of shiploads of negroes taken to Africa is to misunderstand the whole movement. Any adequate estimate of the work of Colonizationists must take into account the effect of their program upon the preservation of national unity. And yet, measured concretely, the Colonization Society was a potent factor in securing the emancipation of slaves, thousands of them, and would have secured the liberation of thousands more, had not the rapid expansion of the Southwest, the consequent increased demand for slaves, and the counteracting influences of hostile propagandists brought about the enforcement of hitherto laxly enforced laws and the enactment of more stringent laws prohibiting emancipations.

The influence of the Society in the suppression of the slave trade has, it seems, been entirely overlooked; and yet, there was a time in its history when it probably saved from transportation into slavery no fewer than twenty thousand native Africans a year.

The limitations of both time and space that are necessarily imposed upon one who undertakes to make a study of this character have made it impracticable to present here a complete history of the Colonization Society. That history covers one hundred years; for the Society is still in

existence, although, since the close of the Civil War, its influence has been considerably limited and it now undertakes but a very small part of what it once undertook. It has been impracticable here to extend the study even to the opening of the Civil War except in the influence of the Society upon the slave trade and upon emancipations and manumissions. The period covered is limited to the years 1817 to 1840. No one who is even tolerably acquainted with the Society's history after its reorganization in 1839, when it came under the control of the North Middle and New England States, can have the slightest well-founded suspicion that thereafter it pursued a proslavery policy. It has been the chief aim of the writer to set forth unequivocally its aims and purposes prior to that time. The years 1839 and 1840 were years of severe strain upon the Society, and some of the most persistent of its leaders were in low spirits during that time. This will appear at the close of the second chapter. But this by no means signifies that there were not brighter days ahead. Indeed, the Society's resources grew rapidly from 1840 to the very beginning of the Civil War. From 1817 to 1839 Colonizationists looked upon their work chiefly from the point of view of its effect upon the solution of the negro problem in the United States; after 1840 they looked upon it chiefly from the point of view of its effect in building upon the coast of Africa a model negro republic. The object, in this study, has been to set forth fully and completely this first period of its history.

CHAPTER I

THE FREE NEGRO AND THE SLAVE

As late as 1825 New England had not forgotten that she had had a part in the introduction of negro slaves into the Southern States. In that year Daniel Dana, addressing the New Hampshire Auxiliary Colonization Society, said :

Let us not imagine, for a moment, that we in this Northern clime, are exempt from that enormous guilt, connected with slavery, and the slave-trade, which we are so ready to appropriate to our brethren in distant States. We have no right thus to wash our hands. From *New England* have gone the ships and the sailors that have been polluted with this inhuman traffic. In *New England* are the forges which have framed fetters and manacles for the limbs of unoffending Africans. The iron of *New England* has pierced their anguished souls. In *New England* are found the over-grown fortunes, the proud palaces which have been reared up from the blood and sufferings of these unhappy men. The guilt is strictly national. . . . National, then, let the expiation be. Let us raise up the humbled children of Africa from their dust. . . . Let us send them back to their native land.¹

Four years later a clergyman from Maine, who hailed the organization of the American Colonization Society as the most promising means of ridding the land of slavery, but whose faith in its efforts was shaken on his hearing that plantation owners who had not set free their slaves were prominent in the movement, made the following confession :

With many others of the Northern people, I have long entertained erroneous views. I have supposed that slavery was an evil confined merely to the slave-holder himself, and that he might and ought immediately to manumit his slaves. But I am convinced that slavery is a National sin! that we, who are so far removed from the scene of its abominations, partake of its guilt! that it is an evil which is entailed upon the present generation of slave-holders, which they must suffer, whether they will or not; and therefore the North should aid the South, in the expense of emancipating and transporting their slaves back to the land of their fathers.²

¹ African Repository, vol. i, p. 146.

² Ibid., vol. v, pp. 78-80.

Professor Silliman, of Yale, called attention to the fact that had New England, New York, New Jersey, and Pennsylvania been cotton producing States, the slave system would have been fastened on them "to the full extent of profitable employment," and he added:

Neither can it be denied that the slave trade, for the supply of the South, was carried on by too many persons in the North. . . .

Slavery is now generally acknowledged, in this country, to be an enormous evil. . . . costly to the proprietor, . . . a source of increasing domestic danger; an insult to the purity of our religion and an outrage on the Majesty of Heaven. This language is not stronger than that which lately resounded in the Capital of Virginia. This is not the proper occasion to discuss the project of the *entire* and *immediate* abolition of slavery; it is enough that it is, at present, impracticable; nor will we take upon us, to reprehend with severity, the intemperate, uncourteous and unchristian language with which the friends of Colonization are from certain [abolition] quarters, assailed through the press. . . . Should their attempt fail, through the unfair and unjust opposition of its enemies, the latter will have much to answer for, to Africa itself, and to the African race in this country, and to the world.³

The attitude of the upper South toward the question of negro slavery went through three distinct and important phases from colonial times to the beginning of the Civil War. The period from the beginning to the close of the eighteenth century may be considered approximately the period of the first phase, when the colonies sought from the king relief from the alarming growth of the slave system. Of this period, suffice it here to say that the single colony of Virginia passed twenty-three acts whose object was the suppression of the evils of slavery. All these came to naught as the result of the royal veto.⁴ The third period extended from 1835 or 1840 to the beginning of the Civil War. This was the period during which the South was definitely and frankly set on the continuation of the slave system. It was the period between the years 1800, and particularly between 1815, and 1835 or 1840, that claims special attention in this study. If during the first period the evils were clearly anticipated and the system called forth protests, if during the last period the visions of Southerners

³ Ibid., vol. viii, pp. 161-187.

⁴ Ibid., 1828, pp. 172-179.

were blurred as a result of a supposed economic self-interest and resentment at the course of radical Abolitionists, during the middle period slavery was looked upon by leaders of thought in the South and in the North as one of the great national problems that pressed for a solution. The American Colonization Society undoubtedly came into being as a result of this point of view. The men who are to be considered its founders recognized in both the free negro and the slave a momentous problem, and the aim of Colonizationists was to find a satisfactory solution of it. The aim of the writer is to present here fairly and fully the nature of that problem.

South Carolina and Georgia, and a large part of Alabama, never engaged with enthusiasm in the work of Colonization. The Southwestern States were but recently admitted into the Union. It was that group of States stretching from, and including, New York at the North, to, and including, North Carolina at the South, and from the Atlantic seaboard to the western limit of Kentucky, that seemed to understand fully the gravity of that problem; yet throughout the first thirty years of the nineteenth century the evils of slavery were admitted by well nigh every State in the Union.

Then, why did not the slaveholding States at this time abolish slavery? Because they did not know how; because the abolition of slavery was the greatest problem the South had ever been called on to face; because no man had suggested a plan that seemed capable of execution. [As late as 1828, J. B. Harrison, of Virginia, a man who had traveled a great deal in his State and who spoke with authority, declared: "Almost all masters in Virginia assent to the proposition, that when the slaves can be liberated without danger to ourselves, and to their own advantage, it ought to be done."⁵]

As early as 1804, Dr. William Thornton, the versatile and distinguished friend of Washington, wrote: "I condemn not, but feel for the situation of the possessors of slaves.

⁵ Ibid., 1828, p. 305.

It is a misery entailed on them by those who did not deeply study the laws of humanity, and who depended too implicitly on laws grounded in impolicy and excluding justice."⁶ And Gerrit Smith, who later became an ardent Abolitionist, said, in 1828: "I am certainly far from reproaching our slaveholders with the peculiar relation in which they stand towards some of their hapless fellow creatures. It is not the fault of most of those slaveholders. Most of them were born to that relation. Many of them sincerely deplore this part of their inheritance."⁷ President Nott, of Union College, said, in 1829: "Our Brethren of the South, have the sympathies, the same moral sentiments, the same love of liberty as ourselves. By them, as by us, slavery is felt to be an evil, a hindrance to our prosperity, and a blot upon our character. But it was in being when they were born and has been forced upon them by a previous generation."⁸ In 1827 C. F. Mercer reported for a committee of the House of Representatives, in reply to memorials of the friends of Colonization:

In many States . . . [the] total number [of slaves] was, as it still continues to be, so great, that universal or general emancipation could not be hazarded, without endangering a convulsion fatal to the peace of society. . . . Nowhere in America . . . has emancipation elevated the colored race to perfect equality with the white; and in many States the disparity is so great that it may be questioned whether the condition of the slave, while protected by his master, however degraded in itself, is not preferable to that of the free negro. [And yet, even in these States,] the principle of voluntary emancipation has operated to a much greater extent than the laws themselves, or the principle of coercion upon the master has ever done, even among those States who had no danger whatever to apprehend from the speedy and universal extension of human liberty.⁹

In a letter received from a gentleman in Massachusetts by the secretary of the Colonization Society in 1826, we find this statement:

The late, and more frequent emancipations in the middle and southern States, is producing a very happy influence on the public

⁶ William Thornton Papers, MS., vol. xiv, "Letter to a Friend," 1804.

⁷ Letters of American Colonization Society, MS., G. Smith to R. R. Gurley, Nov. 17, 1828.

⁸ African Repository, vol. v, pp. 277-278.

⁹ 27th Cong., 3d sess., House Report no. 283, pp. 408-414.

mind, generally in this part of the country. They give a spring to public sentiment, and they teach this great lesson, which we north-erners are beginning to understand, that many slaveholders retain their slaves not because they love slavery; but because they cannot better the condition of their slaves by emancipating them. . . . The south and the north, I am fully persuaded, after having recently traveled thro' nearly all the states of this happy Union, are approach- ing every day towards the same views in reference to this whole sub- ject of our African population, both the bond and the free. . . . The influence of your Society on public *sentiment* is the *main* thing. . . .¹⁰

The following comment appeared in the New York Tract Magazine:

What is the condition and character of those who are emancipated? . . . In general black people gain little, in many instances they are great losers, by emancipation. Law may relieve them from slavery, but laws cannot change their colour.¹¹

In 1818, the General Assembly of the Presbyterian Church, at its meeting in Philadelphia, declared:

We do, indeed, tenderly sympathize with those portions of our church and our country, where the evil of slavery has been entailed upon them; where a *great*, and *the most virtuous part* of the *community* abhor slavery, and wish its extermination, as sincerely as any other; but where the number of slaves, their ignorance, and their vicious habits generally, render an immediate and universal emancipation inconsistent, alike, with the safety and happiness of the master and the slave.¹²

A most valuable contribution to the discussion of this whole subject is to be found in a letter from Francis Scott Key to Benjamin Tappan, in 1838. At a general conference of Congregational Churches the question of slavery was up for discussion. It was proposed to appoint a committee to correspond with prominent Southerners, in an effort to find out the true sentiments of that section on the subject of slavery. Tappan put to Key a number of definite ques- tions. Key prefaced his reply by saying that he had been born and reared in Maryland, a slaveholding State, but "No Northern man began the world with more enthusiasm against slavery than I did. For forty years and upwards, I have felt the greatest desire to see Maryland become a free

¹⁰ African Repository, vol. ii, pp. 121-122.

¹¹ Ibid., vol. i, pp. 91-92.

¹² Ibid., vol. i, pp. 272-276.

State, and the strongest conviction that she could become so." For he believed that "no slave State adjacent to a free State can continue so," the superiority of free, over slave, labor being so clearly demonstrated, and the power of public sentiment being so strong that gradual emancipation would always result. He continues:

I have emancipated seven of my slaves. They have done pretty well, and six of them, now alive, are supporting themselves comfortably and creditably. Yet I cannot but see that this is all they are doing now; and, when age and infirmity come upon them, they will probably suffer. It is to be observed, also, that these were selected individuals, who were, with two exceptions, brought up with a view to their being so disposed of, and were made to undergo a probation of a few years in favorable situations, and, when emancipated, were far better fitted for the duties and trials of their new condition than the general mass of slaves. Yet I am still a slaveholder, and could not, without the greatest inhumanity, be otherwise. I own, for instance, an old slave, who has done no work for me for years. I pay his board and other expenses, and cannot believe that I sin in doing so.

The laws of Maryland contain provisions of various kinds, under which slaves, in certain circumstances, are entitled to petition the courts for their freedom. As a lawyer, I always undertook these cases with peculiar zeal, and have been thus instrumental in liberating several large families and many individuals. I cannot remember more than two instances, out of this large number, in which it did not appear that the freedom I so earnestly sought for them was their ruin. It has been so with a very large proportion of all others I have known emancipated.

Tappan's first question was: "Does the opinion generally prevail among the ministers and members of southern churches that slaveholding as practised in this country, is sanctioned by the Word of God? If this is not their opinion, how do they justify themselves in holding slaves?" Key's reply was that he thought that the Bible neither sanctioned slaveholding, *under all circumstances*, nor prohibited slaveholding, *under all circumstances*. The golden rule should be applied in each particular case. He continued:

Hundreds and thousands of Christians, showing in their whole life, undoubted evidences of the faith which they profess, have so applied this rule to their consciences, and so come to this conclusion. Their brethren at the North, knowing nothing of the peculiar circumstances under which they have acted, nor of the care and faithfulness with which they have inquired and decided, call upon them to justify themselves for violating the sanctions of God's Word.

Key pointed out conditions under which slaveholding was in his opinion a duty. For instance, a man inherits, through no fault of his own, an old slave, too old to work or to care for himself. So also, in the case of a slave by nature so indolent and intemperate that without restraint he would be wretched himself and a burden to others. So, too, in the case of a slave purchased in order that he might not be sold in one of the distant States, and thus separated from a wife and family who lived on a neighboring plantation; or, in the case of the purchase by one man of the slave of another, in order to save the slave from cruel and unjust treatment.

Another question put to Key was: "Do professors of religion forfeit their christian character by buying and selling slaves, as they may find it convenient? or do they subject themselves to censure and discipline by any immorality or ill treatment of which they might be guilty towards their slaves?" The reply was:

The persons among us who buy and sell slaves for profit are never, as I have ever heard or believe, professors of religion. Such conduct, or any immorality or ill treatment towards their slaves, would forfeit their Christian character and privileges, if their minister did his duty. And nothing more disgraces a man, in general estimation, than to be guilty of any immorality or ill treatment towards his slaves.¹⁸

DeTocqueville, that keen observer of American institutions, expressed sentiments of great value to those who had ears to hear. He demonstrated beyond a doubt, that the abolition of slavery in the South was a far different problem from, and a far graver problem than, its abolition in the North. This was true (1) because the climate of the South was far more favorable to slave labor than the climate of the North; (2) because of the nature of the Northern and of the Southern crops, the former requiring attention only at intervals, the latter requiring almost constant attention; (3) because of the tendency of slavery to move toward the South.

He pointed out the fact that in 1830 there was in Maine

¹⁸ Ibid., vol. xv, pp. 113-125.

only one negro for every three hundred of the whites; in Massachusetts one negro for every one hundred; in Virginia forty-two for every one hundred; in South Carolina fifty-five for every one hundred. And his conclusion was that "the most Southern States of the Union cannot abolish slavery without incurring very great danger, which the North had no reason to apprehend when it emancipated its black population." "The Northern States had nothing to fear from the contrast, because in them the blacks were few in number, and the white population was very considerable. But if this faint dawn of freedom were to show two millions of men their true position, the oppressors would have reason to tremble." He disclaimed any sympathy with the principle of negro slavery, but said:

I am obliged to confess that I do not regard the abolition of slavery as a means of warding off the [to him, inevitable] struggle of the two races in the United States. The negroes may long remain slaves without complaining; but if they are once raised to the level of free men, they will soon revolt at being deprived of all civil rights; and as they cannot become the equals of the whites, they will speedily declare themselves as enemies. In the North everything contributed to the emancipation of the slaves; and slavery was abolished, without placing the free negroes in a position which could become formidable, since their number was too small for them to claim the exercise of their rights. But such is not the case in the South. The question of slavery was a question of commerce and manufacture for the slave-owners in the North; for those of the South, it is a question of life and death.

When I contemplate the condition of the South, I can only discover two alternatives which may be adopted by the white inhabitants of those States; viz., either to emancipate the negroes, and to intermingle with them; or, remaining isolated from them, to keep them in a state of slavery as long as possible. All intermediate measures seem to me likely to terminate, and that shortly, in the most horrible of civil wars, and perhaps in the extirpation of one or other of the two races.¹⁴

In a memorial from the Colonization Society to Congress in 1819, the following sentiment is expressed:

If one of these consequences [that is, a consequence of Colonization] shall be the gradual and almost imperceptible removal of a national evil, which all unite in lamenting, and for which, with the most intense, but hitherto hopeless, anxiety the patriots and statesmen of our country have laboured to discover a remedy, who can

¹⁴ DeTocqueville, *Democracy in America*, D. Appleton and Company, ed. of 1904, vol. i, pp. 383-404.

doubt, that of all the things we may be permitted to bequeath to our descendants, this will receive the richest tribute of their thanks and veneration? Your memorialists cannot believe that such an evil, universally acknowledged and deprecated, has been irremovably fixed upon us. Some way will always be opened by Providence, by which a people, desirous of acting justly and benevolently, may be led to the attainment of a meritorious object.¹⁵

Dr. William Thornton had pointed out clearly in 1804 the seriousness of the problem of the abolition of slavery in the South as compared with its abolition in the North. At that time he said that, in the North, the comparatively few slaves were so distributed among the population that a general emancipation fell but lightly upon each owner; whereas, in the South, "it would perhaps be requiring too much from humanity, to expect those who hold slaves to emancipate them, and thus reduce their own families from affluence to absolute misery. And there is frequently no alternative." He deprecates the evils of slavery, but "it has been not only a query with others, but with myself, whether this partial good does not increase the general evil. . . . Evil therefore rests on evil till a mountain rises whose summit is shadowed by a cloud of sin."¹⁶ And many years later Henry Clay, in a speech on the subject of Abolition petitions, made in the United States Senate, February 7, 1839, estimated the value of property in slaves, in the South, at \$1,200,000,000—owned by persons of all classes, those who could afford to emancipate their slaves and very many who could not. Slave property, he said, "is the subject of mortgages, deeds of trust, and family settlements. It has been made the basis of numerous debts contracted upon its faith, and is the sole reliance, in many instances, of creditors within and without the slave States, for the payments of debt due to them."¹⁷

It is also to be observed that those proprietors who were most anxious to emancipate their slaves were the very ones from whom the slaves received the most consideration. Scores of instances could be noted of the proffer of their

¹⁵ Origin, Constitution, and Proceedings, M.S., American Colonization Society, vol. i, pp. 127-128.

¹⁶ Thornton Papers.

¹⁷ African Repository, vol. xv, pp. 150-164.

freedom, by such masters, to their slaves, and of the slave's refusal to go free. In succeeding pages of this study instances will also be pointed out of negroes who requested to be purchased by benevolent men. Rev. R. R. Gurley, secretary of the American Colonization Society, tells of an interesting native African sold to a South Carolina slaveholder. The negro's name was Moro; he was educated a Mohammedan.

About twenty years ago, while scarcely able to express his thoughts intelligently on any subject in the English language, he fled from a severe master in South Carolina, and on his arrival at Fayetteville was seized as a runaway slave, and thrown into jail. His peculiar appearance, inability to converse, and particularly the facility with which he was observed to write a strange language attracted much attention, and induced his present humane and Christian master to take him from prison and finally, at his earnest request, to become his purchaser. His gratitude was boundless, and his joy to be imagined only by him, who has himself been relieved from the iron that enters the soul. Since his residence with General Owen [his purchaser] he has worn no bonds but those of gratitude and affection. . . . Being of a feeble constitution, Moro's duties have been of the lightest kind and he has been treated rather as a friend than a servant. The garden has been to him a place of recreation rather than toil, and the concern is not that he should labor more but less.¹⁸

There are significant statements in a note, appended by himself, to the will of Reverend Thomas S. Witherspoon, of Alabama:

It will be plainly seen that my intention is to liberate them [six slaves] by colonizing them in some of the colonies of free blacks. This I would do now, but they utterly refuse to leave me, protesting that they will not leave me until my death. . . . I cannot meet death in peace while the consciousness of the fact is left that these faithful and pious servants are to be left in bondage. I feel that I am responsible to God for them. . . . I am a Presbyterian minister. . . . My slaves I inherited from my father and through my deceased wife, all but one, whom I purchased to keep him with his wife.¹⁹

It must not be supposed that the upper South was ignorant of the comparative cost of slavery. In a report of the Delaware Auxiliary Colonization Society, in 1825, we find these words: "It [slavery] depreciates our soil, lessens our agricultural revenue, and like the lean kine of Egypt, eats

¹⁸ Letters of American Colonization Society, MS., Gurley to Board of Managers, May 21, 1837.

¹⁹ *Ibid.*, J. M. Witherspoon to the President, Dec. 15, 1845.

up the fat of the land. It will hardly admit of a question, but that the Southern section of our country would, in a few years, be richer without one slave, than it is now with 1,600,000."²⁰ And two years later J. H. B. Latrobe, for many years President of the Colonization Society, declared:

When white labour becomes so cheap that three men can be hired all the year, and ten at harvest, for less than the families of thirteen working negroes can be supported for (including the services of children), all the twelve months, to do the labour of a farm, these slaves will be the ruin of their possessors. This is coming to pass rapidly, and will be the result of the present state of things and the gradual increase of a white population, before many years, in all those States which do not cultivate rice and cotton—slave labour must be rendered valueless there by competition from the very place we are labouring to build up [Liberia]—cotton and rice cultivated by *free* labour in Africa, ought according to all politico-economical calculations, to undersell the cotton and rice cultivated by *slave* labour to the South; when this is the case, Carolina and her brothers and sisters, or, Carolina and Company, will receive a shock which for some years may prostrate them, but it will be like that weakness which is the immediate effect of a medicine which in the end cures the patient.²¹

In the Virginia Convention of 1829, C. F. Mercer pointed out the fact that, in 1817, the land of Virginia was valued at \$206,000,000, while in 1829 the same land was valued at only \$96,000,000; and that, while the average value of slaves, in Virginia, was \$300 in 1817, the average value, in 1829, was only \$150.²² Henry Clay, for years President of the Society, expressed very clearly his view in 1830. As the population of the United States increased, he predicted, the European would gain ground, numerically, over the negro; hence, white labor would become more abundant. Given enough laborers, free labor is always cheaper than slave labor. Therefore the value of slaves would become smaller and smaller; masters would discourage the raising of negro children; and slavery would become so obviously unprofitable that emancipations would become more and more common. He added:

²⁰ African Repository, vol. i, pp. 343-344.

²¹ Letters of American Colonization Society, MS., Latrobe, Jan. 5, 1827.

²² African Repository, vol. v, p. 377.

What has tended to sustain the price of slaves in the U. S. has been . . . especially the increasing demand for cotton, and the consequent increase of its cultivation. The price of cotton . . . regulates the price of slaves as unerringly as any one subject whatever is regulated by any standard. . . . The adult slaves will, in process of time, sink in value even below \$100 each, I have no doubt.²³

Mrs. Ann R. Page, than whom no more conscientious individual, more consistent opponent of slavery, or more zealous friend of the American Colonization Society lived in the State of Virginia, wrote, in 1831: "The expense of slave estates keeps Virginians, at least many, unable to give freely, unless a new spirit of stronger faith and love could actuate them to deny accustomed self-indulgencies." "If ever I get out of debt, all I hope to want with money is to further its [the American Colonization Society's] plan."²⁴ In 1834 Garritt Meriweather wrote:

I am a slaveholder and have it in contemplation to liberate several of my slaves, *provided*, they could be removed to Liberia at a cost I could afford. But mine is the common misfortune of most slaveholders—a nominal wealth only; the *shadow* and not the substance, the reality. We may give to Freedom—to Liberia—this delusive property (and I dare say with the majority of masters it would be gain) but here would end the *boom*, for with them could be added no purse, or means of emigration or settlement. There are many, very many, slaveholders, I am sure, who would *cheerfully* relinquish all their slave property to Liberia, could they afford the means of equipment and settlement or temporary maintenance of such manumitted slaves.²⁵

The dread of insurrections only added to the problem. In 1791 the slaves of Hayti revolted. For a time the island was without a civil government; and when in 1801 there was an emergence of order, it was in the form of a negro government. In 1800, a negro, Gabriel by name, of Hanover County, Virginia, planned an insurrection. In 1822, Denmark Vesey, of Charleston, was hanged before he was able to execute a plot.²⁶ In August, 1831, the whole upper South was profoundly moved by the Southampton mas-

²³ Ibid., 1830, pp. 1-25.

²⁴ Letters of American Colonization Society, MS., Mrs. A. R. Page to the Secretary, Millwood, Va., March 26, 1831.

²⁵ Ibid., Meriweather to Gurley, April 23, 1834.

²⁶ A. B. Hart, Slavery and Abolition, pp. 157, 163.

sacre. In October of that year, Collin H. Minge, of Virginia, wrote:

I am . . . sure that there is not an enemy to the cause of Colonization in Virginia at this time. The predictions of Mr. Randolph some years since are now becoming true; the whites are running away from the blacks, the masters from the slaves, in lower Virginia, the place of insurrection. I received an intimation from a gentleman yesterday to go to his house to advise his negroes, 8 in number, most young ones, to embark for Liberia, as he was willing to emancipate them. Our next Legislature I think will do something.²⁷

The feeling of alarm that came over one of the counties of Virginia in which negroes were numerous is apparent from a petition signed by one hundred and ninety-five citizens of Northampton County and dated December 6, 1831, just after the Southampton massacre. While it will be evident, from extracts here given, that there was an urgent demand for the removal of the free negro, the demand arose rather from the fear for their personal safety among the citizens than from a desire to perpetuate slavery. The petition in part follows:

By the last census of the U. States it appears that there are in this county 3573 whites, 3734 slaves, and 1334 free persons of colour. By a comparison with the census of preceding years, it also appears that the proportion of free persons of colour to our white inhabitants is annually increasing. . . . The free persons of colour in Virginia form an anomalous population, standing in a relation to our society, which naturally exposes them to distrust & suspicion. Inferior to the whites in intelligence & information; depraved by the stain which attaches to their colour; excluded from many civil privileges which the humblest white man enjoys, and denied all participation in the government, it would be wholly absurd to expect from them any attachment to our laws & institutions, or any sympathy with our people. On the other hand, the enjoyment of personal freedom is in itself a sufficient mark of distinction between them & our slaves, and elevates them, at least in their own opinion, to a higher condition in life. Standing thus in a middle position between the two extremes of our society and despairing of ever attaining an equality with the higher grade, it is natural that they should connect themselves in feeling & interest, with the slaves among whom many of their domestic ties are formed, and to whom they are bound by the sympathies scarcely less strong, which spring from their common complexion. Independent, therefore, of any particular facts calculated to excite our alarms, the worst evils might justly be apprehended from such an increase of their numbers as would give them confidence in their physical power, while it would enlarge their

²⁷ Letters of American Colonization Society, MS., C. H. Minge to Gurley, Oct. 22, 1831.

means of information, facilitate their intercommunications, and thus add to their capabilities of mischief. Unhappily, however, this is no longer a subject of mere speculation. The scenes which have recently passed around us contain a melancholy & impressive lesson upon the subject, to which the most careless and supine among us cannot be unattentive. The caution which these scenes suggest is of peculiar importance to us. From the number of our free negroes, and from the idle & vicious habits of most of them, we have stronger reason than exists in most of our counties, to suspect dangerous intrigues with our slaves; nor can we be insensible to the great aid which our slaves would derive from that source, in any actual attempts against us.

They therefore appealed to the legislature for permission to borrow \$15,000.00, to be repaid by the citizens of the county levying upon themselves a tax equal to the existing State tax. They further resolved: "That our representatives be instructed to vote for every measure, whether of a general or local character, which may have for its object the removal of the free people of colour from the State at large or any part thereof." And the motive is clearly set forth in the concluding portion of the petition: "The evil of which we complain is found to be no longer endurable, without the most serious dangers to the peace & security of our county, & we are willing to rid ourselves of it at every sacrifice & every hazard."²⁸

In December of the same year, a member of the Virginia Legislature wrote to the Colonization Society asking whether a very large number of immigrants, such as Virginia might desire to send at once to the Liberian colony, could be received on short notice. He said:

The subject of colonising the free people of colour in this commonwealth, and such of the slaves as their proprietors may voluntarily emancipate, (if indeed it be not made to comprise a scheme of general emancipation,) will be acted upon by the Virginia Legislature during its present session. As a member of that body feeling the liveliest interest in that part of the African race who have residence among us, as well as in the general welfare of our country, upon which they are admitted to be a lamentable burden, it would be highly culpable in me to remain inactive, during the agitation of the subject.

The horrible affair of Southampton has given rise to new and decided feelings in the breasts of Virginians from every part of the State, in regard to the black population. And the friends of

²⁸ Legislative Petitions, MS., Dec. 6, 1831, Virginia State Library.

Colonization, (I had almost said, of emancipation) may now find willing and anxious agents, to push to the utmost practicable extent their philanthropic wishes.

The following January he wrote:

The committee to which was referred the subject of the free people of colour was organized on Monday last, and have proceeded to discuss some of the delicate questions relating to it. Upon one point there is no difference of opinion; I mean as to the expediency of adopting a scheme *at once* for the removal of the free people of colour, and such of the other class as their proprietors may voluntarily manumit. Thus far the people are prepared to go, as shewn in their accumulated memorials from every portion of the State. Many are for going much farther, and comprehending the whole black class in a system of gradual reduction. . . . The Legislature are certainly ready to make the most ample appropriation, efficiently to carry through the first named object. Different sums are mentioned, from 100,000 to 300,000 dollars annually. . . .⁹⁹

[Opinion in the border slave States at this time undoubtedly was: (1) the abolition of slavery, if practicable, consistently with the safety of the whites and the welfare of the blacks, was desirable; (2) any scheme of immediate and unconditional emancipation was wholly impracticable; (3) the tendency among newly emancipated negroes was to incite the slaves to revolt; (4) emancipated negroes, as a class, had not been benefited, but, on the contrary, had been actually the losers by the fact of emancipation. The opinion was widespread in the whole South that if the time ever came when two races, as distinct as the white and the black, occupied the same territory, and were numerically not greatly unequal, a war of extermination was almost inevitable.] It has been seen that DeTocqueville held distinctly to this view and, although he was altogether an opponent of the principle of slavery, the only suggestions he had to offer to the South were amalgamation with the blacks, and a continuance of the system of slavery as long as possible. To look for amalgamation was to look for the mountains to remove themselves; and yet, up to a period as late as 1840, the leaders of thought, except in the Southeastern States, were far from willing to admit that the other was the only alternative.

⁹⁹ Letters of American Colonization Society, MS., C. S. Carter, Dec. 22, 1831; Jan. 6, 1832.

Not long after the organization of the Colonization Society, Dr. William Thornton expressed the conviction that there "never could exist a sincere union between the whites and the blacks, even on admitting the latter to the rights of freemen."²⁰ In 1827, Clay asked:

What is the true nature of the evil of the existence of a portion of the African race in our population? It is not that there are *some*, but that there are so *many* among us of a different caste, of a different physical, if not moral, constitution, who never could amalgamate with the great body of our population. . . . Any project, therefore, by which, in a material degree, the dangerous element in the general mass, can be diminished or rendered stationary, deserves deliberate consideration.²¹

Jonathan Mayhew Wainwright, in 1829, asked a similar question:

What is to be done with our rapidly increasing coloured population? Any one who can think, and compute numbers, and who will look at our censuses of population, must be convinced that the reply to this inquiry should call forth all the wisdom, foresight, patriotism, and benevolence of our whole country. A refuge must be prepared for these people.²²

W. M. Atkinson, one of the most prominent Colonizationists in the State of Virginia, said:

On one point we differ *toto caelo*—I have no doubt that emancipation without emigration, would utterly ruin the State. I further believe that it would end in the extermination of the one race or the other—and if so, I do not doubt it would be the African. Hence I must oppose it, everywhere, and by all gentlemanly and Christian means. Hence, too, one reason of my zeal for colonization, as indispensable to that other indispensable measure [emancipation].

I succeeded today in obtaining a decree for the emancipation of Elder's slaves, but his cause will go to the court of appeals.²³

In 1830, the Senate of Massachusetts, in a resolution highly commendatory of the Colonization project, stated: "In those States where slavery is tolerated, as well as in the others, where it has ceased to exist, the dangers and difficulties, emanating from the great and increasing numbers of free persons of colour, had long been the subjects of

²⁰ African Repository, vol. i, pp. 87-88.

²¹ Ibid., vol. ii, pp. 334-345.

²² Letters of American Colonization Society, MS., Wainwright to Gurley, Jan. 5, 1829.

²³ Ibid., Atkinson to Gurley, Nov. 10, 1831.

deep individual solicitude and inquiry, and of numerous legislative enactments."⁸⁴ In 1839 Clay declared:

In the slave States the alternative is, that the white man must govern the black, or the black govern the white. In several of these States the number of slaves is greater than that of the white population. An immediate abolition of slavery in them, as these ultra-abolitionists propose would be followed by a desperate struggle for immediate ascendancy of the black race over the white race, or rather it would be followed by instantaneous collisions between the two races, which would break out into a civil war that would end in the extermination or subjugation of the one race or the other.⁸⁵

This alarm at the rapid increase of the free negro population was an important cause of enactments of slaveholding States prohibiting emancipations. Within a fortnight of the organization of the Colonization Society, a memorial was presented to Congress, by its Board of Managers, in which this rapid increase was remarked on in the following words: "The evil has become so apparent, and the necessity for a remedy so palpable, that some of the most considerable of the slaveholding States, have been induced to impose restraints upon the practice of emancipation, by annexing conditions, which have no effect but to transfer the evil from one State to another."⁸⁶ In reply to memorials from Colonizationists, the Legislature of Virginia stated:

The extent of this evil [the increase in the number of free negroes] may be fairly estimated, by a reference to our Statute book. The laws intended either to prevent or to limit its effects, are of a character, which nothing, but the extreme necessity of the case, could ever justify, to a community of republicans; and the obligation to resort to them, is sufficient to command the serious attention of every enlightened patriot.

To considerations such as these, may be traced the policy first resorted to by the Legislature of Virginia in 1805, of arresting the progress of emancipation, by requiring the speedy removal from the State, of all to whom its privileges might be extended.⁸⁷

In an address before the New Hampshire Colonization Society, Daniel Dana said:

It is a fact, given us on the most unquestionable authority, that there are now in the Southern States of our Union, hundreds, and

⁸⁴ African Repository, vol. vi, pp. 144-147.

⁸⁵ Ibid., vol. xv, pp. 50-64.

⁸⁶ Origin, Constitution, and Proceedings, American Colonization Society, MS., pp. 13-19.

⁸⁷ African Repository, vol. v, pp. 50-55.

even thousands of proprietors, who would gladly give liberty to their slaves, but are deterred by the apprehension of doing injury to their country, and perhaps to the slaves themselves. It is a fact that in the States of Maryland and Virginia alone, there were fifteen years since, 63,000 free people of colour. It is likewise a fact, that within a few years past, more than 500 slaves have been emancipated, in the State of Virginia, by only three proprietors. Indeed, so prevalent has been the disposition of Southern proprietors, for many years, to give liberty to their slaves, that this condition of things has excited a serious alarm. The legislatures of several States have interposed their authority, and prohibited the emancipation of slaves, except on the condition of their being transferred to some other State.²⁸

The House of Representatives of Maryland, in 1831, passed the following resolutions:

That as philanthropists and lovers of freedom, we deplore the existence of slavery amongst us, and would use our utmost exertions to ameliorate its condition, yet we consider the unrestricted power of manumission as fraught with ultimate evils of a more dangerous tendency than the circumstance of slavery alone, and that any act, having for its object the mitigation of these joint evils, not inconsistent with other paramount considerations, would be worthy the attention and deliberation of the representatives of a free, liberal-minded and enlightened people.

Resolved, That we consider the colonization of free people of colour in Africa as the commencement of a system, by which, if judicious encouragement be afforded, these evils may be measurably diminished.²⁹

It is a significant fact, however, that these individual and legislative objections to the right of emancipation were confined to cases in which the emancipated remained within the limits of the State. In explanation of this fact, students of slavery have urged that the real reasons behind such objections was either the desire of pro-slavery men to "boost" the price of slaves by reducing to a minimum the competition of free-negro labor, or the fear, among the slaveholders, that an increasing free negro element was dangerous to the security of their slave property. Undoubtedly both of these explanations contain an element of truth; but there is abundant evidence to show that the leading single cause of this widespread attitude was the deliberate and firm conviction that the free negro was a source, and a most

²⁸ Ibid., vol. i, p. 144.

²⁹ Ibid., vol. vii, p. 30.

fruitful source, of lawlessness and crime, of social and political insecurity. The degrading influence of, and the degraded condition of, the free negro were recognized and remarked upon from every quarter of the Union. It was not a sectional opinion; it was a national one. Of this important free negro problem DeTocqueville writes:

Whoever has inhabited the United States must have perceived that in those parts of the Union in which the negroes are no longer slaves, they have in nowise drawn nearer to the whites. On the contrary, the prejudice of the race appears to be stronger in the States which have abolished slavery than in those where it still exists; and nowhere is it so intolerant as in those States where servitude never has been known. The electoral franchise has been conferred upon the negroes in almost all the States in which slavery has been abolished; but if they come forward to vote, their lives are in danger. . . . The gates of Heaven are not closed against these unhappy beings; but their inferiority is continued to the very confines of the other world; when the negro is defunct, his bones are cast aside, and the distinction of condition prevails even in the equality of death.

In the South, where slavery still exists, the negroes are kept less carefully apart; they sometimes share the labour and the exertions of the whites; the whites consent to intermix with them to a certain extent, and although the legislation treats them more harshly the habits of the people are more tolerant and compassionate. . . . Thus it is, in the United States, that the prejudice which repels the negroes seems to increase in proportion as they are emancipated, and inequality is sanctioned by the manners while it is effaced from the laws of the country.⁴⁰

Memorialists from the Richmond and Manchester Auxiliary Colonization Society, about 1825, called attention to the fact that of 37,000 free negroes in Virginia, not two hundred were proprietors of land.⁴¹ About the same time the New York Tract Magazine stated:

Free blacks are collected in large towns and cities, where a great portion of them are found in the abodes of poverty and vice, and become the tenants of poor houses and prisons. As a proof . . . the following striking fact has been mentioned. The State of Pennsylvania, before the last census, had a population of upwards of 800,000; the number of free blacks was about 26,000, and yet one half of the convicts in the State prison were free blacks.⁴²

The Charlottesville, Virginia, Central Gazette declared: "that slavery is unjust by the laws of nature, is a truth

⁴⁰ DeTocqueville, vol. i, p. 383 ff.

⁴¹ African Repository, vol. i, p. 67.

⁴² Ibid., vol. i, pp. 91-92.

which every man derives directly from the infallible oracles of his own conscientious convictions," and at the same time it declared that the emancipation of the slaves, without their removal from the State, "would be pernicious."⁴³ In 1827, a citizen of Chillicothe wrote: "In most of the towns of Ohio, there are a number of free blacks, who with few exceptions, are little less than a nuisance and their numbers are every year increasing by immigration, as well as other causes. All of the whites would willingly do something to free themselves from this evil."⁴⁴

Gerrit Smith, who had thought of establishing a school for free negroes, "so that they might take knowledge and Christianity to the natives of Africa," announced, in 1827:

I am recently getting off this scheme. The turn that *negro-learning* takes in this country is not always favorable. It is certainly not so with the editors of the *Freedom's Journal*, a paper I was at first disposed to patronize and which I still take. . . . My heart is fully set on discharging the patriotic duty of contributing to relieve our country of its black population.⁴⁵

A Virginia clergyman, writing to the Colonization Society in 1829, states:

Having formerly set free a number of coloured people who are now vagabonds, I have done them no profit, but injured society. For this there is no remedy, as I have no control over them. Those still in my possession, I cannot conscientiously emancipate, unless they shall be removed by the Society to Liberia. A list of six, which I wish transferred to the Colony, was last fall furnished to the Society, and entered upon its books. I wish them to be called for, as I am old, and desire the business may be completed before I quit my earthly station.⁴⁶

In 1829 the President of Union College stated:

Our manumitted bondmen have remained already to the third and fourth, as they will to the thousandth generation—a distinct, a degraded, and a wretched race. When therefore the fetters, whether gradually or suddenly, shall be stricken off, and stricken off they will be, from those accumulating millions yet to be born in bondage, it is evident that this land, unless some outlet be provided, will be flooded with a population as useless as it will be wretched; a

⁴³ *Ibid.*, vol. i, p. 215 ff.

⁴⁴ Letters of American Colonization Society, MS., Wm. Graham to Gurley, Feb. 10, 1827.

⁴⁵ *Ibid.*, G. Smith to Gurley, Oct. 10, 1827.

⁴⁶ *African Repository*, vol. v, pp. 177-178.

population which, with every increase, will detract from our strength, and only add to our numbers, our pauperism and our crimes. Whether bond or free, their presence will be forever a calamity. Why, then, in the name of God, should we hesitate to encourage their departure?⁴⁷

Arthur Tappan, soon to be a disciple of William Lloyd Garrison, had, himself, experienced a problem whose solution evidently gave him concern; although, had he been a Southerner, he would doubtless have quietly added another item to his account for incidental expenses. Slave traders had brought to America and sold two brothers, the sons of Prince Abduhl Rahhahman, a native African prince. These had secured their freedom and were, at the time Tappan wrote, in New York, being cared for by Tappan himself.

I feel it to be incumbent on me to advise with the managers of your Society before sending the children of Prince Abduhl Rahhahman to Norfolk [to be transported to Africa], respecting the single son. Without any motive that we discover, having a sufficiency of food, etc., he has been guilty of stealing some poultry and has been liberated from prison, . . . by his brother's borrowing and paying a sum of money. I can regard this as no less than an indication of a thievish propensity that will be likely to show itself whenever a good opportunity offers.⁴⁸

Of this class of persons, Henry Clay said: "They are not slaves, yet they are not free.—The laws, it is true, proclaim them free; but prejudices, more powerful than laws, deny them the privileges of freemen. . . . They crowd our large cities . . . where those who addict themselves to vice can best practice and conceal their crimes." He also called attention to the adoption, by the city of Cincinnati, of measures to expel all "who could not give guaranties of their good behavior."⁴⁹ President Duer, of Columbia, said of the free blacks:

Their numbers are constantly increasing in a formidable ratio. At the South they are looked upon with suspicion, and almost with abhorrence. At the North they are regarded as an inferior caste, and consequently deprived of every incentive to virtuous action. . . . Conscious that they can never surmount these barriers, they natu-

⁴⁷ Ibid., vol. v, pp. 277-278.

⁴⁸ Letters of American Colonization Society, MS., Tappan to Gurley, Sept. 11, 1830.

⁴⁹ African Repository, March, 1830, pp. 1-25.

rally become improvident—and from improvidence the descent is easy to recklessness, profligacy, and crime. To the fidelity of this inference our criminal calendar bears melancholy witness. Comparing the relative proportions of white and colored population in our State, more than nine-tenths of those who are arraigned at our police establishments and courts of sessions, and who occupy the cells of our bridewells, penitentiaries, and State prisons, are, we are constrained to say, of the latter description.⁵⁰

Reverend William Meade, later Bishop of Virginia, the first agent of the Colonization Society and a man who, though by no means wealthy, gave hundreds of dollars to the cause, and who hated the system of slavery as sincerely as did any son of New England, and said of it that it is "one of the most deadly evils that ever afflicted a nation," wrote, in 1832:

I have thought, read, conversed, written, and spoken much on this subject for the last fifteen years. I have travelled through all the length and breadth of our land, and witnessed the condition of the negroes, bond and free; conversed fully with them, their owners, and their philanthropic friends; and every year only rivets the conviction more deeply in my mind, that to do them real good they must be separated from those of a different color.⁵¹

C. F. Mercer, for a committee of the House of Representatives, at Washington, replied to memorials from the friends of Colonization, presented in 1827. He called attention to the fact that one of the important results of the large number and the degraded condition of the free blacks in the South, was to impose further restraints upon the practice of emancipation.⁵²

Reverend William Henry Foote wrote of the free colored population of Hampshire County, Virginia, now West Virginia: "They are here a miserable race. . . . I have a number of colored members in my church (about 30) and only two are free, and they are old. The slaves are better in every respect. And in sending to Africa I should from this region prefer for the good of the Colony a manumitted

⁵⁰ Letters of American Colonization Society, MS., Duer to Gurley, Dec. 10, 1831.

⁵¹ African Repository, vol. viii, pp. 86-87; Letters of American Colonization Society, MS., Meade to Samuel Wilkeson, Dec. 14, 1839.

⁵² 27th Cong., 3d sess., H. Rept. no. 283, pp. 408-414.

black to one of these already free or born free."⁵³ In 1836, Citizens of Dauphin County, Pennsylvania, petitioning Congress in behalf of Colonization, spoke in no uncertain tones of the unworthiness and degradation of the free negro population.⁵⁴ Judge Samuel Wilkeson, of New York, later general agent for the Colonization Society, wrote to Lewis Sheridan, a free negro of respectability, a very successful farmer of North Carolina, and himself the owner of nineteen slaves:

The high character which you have acquired in North Carolina, for moral worth and mercantile ability, might be regarded as evidence that the colored man stands on ground equally elevated as the white man, making allowance only for the difference of education, and political condition. . . . Feeling a great desire for the elevation of the colored man, I embraced every opportunity by several visits to the Southern and Southwestern States of making myself acquainted with the condition of both slaves and free people of colour, and their susceptibility of elevation in this country. . . . I am satisfied that the coloured man is as capable of acquiring trades as the white man, and that the reason he is so seldom found in the Middle and Eastern States carrying on mechanic business, is not for want of ability to acquire the knowledge and skill, but on account of the difficulties and discouragements incident to his condition. . . . The merchant will not employ them as clerks; the mechanic will not employ them as journeymen; should he perchance find such employment, he applies for board and is refused—other workmen will not eat with him; thus he meets at the very outset in life with difficulties which he cannot surmount.

Wilkeson proposed that he should be one of ten men to organize a ship line between the United States and Liberia to be turned over to free negroes in order to give them encouragement in their mercantile ambitions.⁵⁵

A free negro from South Carolina had been induced to go to the North. Writing to friends in his native city, he requested the names of the members of the State Legislature, in order that he might urge them to repeal the law forbidding free blacks to come into the State, for he desired to return. He says:

Although I have visited almost every city and town, from Charleston, South Carolina, to Portland, Maine, I can find no such home

⁵³ Letters of American Colonization Society, MS., Foote to Gurley, Sept. 19, 1833.

⁵⁴ African Repository, vol. xii, pp. 82-85.

⁵⁵ Ibid., vol. xiv, pp. 58-60.

and no such respectable body of colored people, as I left in my native city Charleston. The law in my adopted city, Philadelphia, when applied to colored people, in opposition to white people, is not as good as in Charleston, unless the former has respectable white witness to sustain it. . . . All the advantage that I see by living in Philadelphia is, that if my family is sick, I can send for a doctor at any time of the night without a ticket.⁵⁶

And the following extract from Marville H. Smith's letter seems to bear out the assertion of De Tocqueville, that the free negro was nowhere so badly treated as in those parts of the Union in which slavery never existed. Smith was a free negro who acted as the spokesman for a group of eighteen, who had gone to Illinois.

We are ready to start from Shawneetown at any moment, and wish the time to come as soon as possible [the time to go to Liberia]; for though we are free in name we are not free in fact. We are in as bad, or worse condition than the slaves of which you speak, being compelled to leave the State, or give security, and those of the whites who would befriend us are debarred by the fear of public opinion. If only those who deserve such treatment, if any do, were the only ones to suffer we should be content; but on the contrary, if one misbehaves, all the colored people in the neighborhood are the sufferers, and that frequently by unlawful means; dragged from our beds at the hour of midnight, stripped naked, in presence of our children and wives, by a set of men alike lost to mercy, decency and Christianity, and flogged till they are satisfied, before we know for what; and when we are informed, it is probably the first time we heard of the offence. Such is our situation and such the condition from which your Society can extricate us. We deem it worse than slavery. We say again we wish to go to Liberia, and if no way else is provided, we had as lief soon *indent* ourselves to the Society for *life* for our passage, so we can live among our own color. Let me know as soon as possible, whether you can help us, and how soon, and how much.⁵⁷

Roger M. Sherman, of Connecticut, said of the emancipated slave: "He is liable to be taken and sold again into slavery, unless removed from the State. Remove him to a free State, and he is cut off from the hopes of any political standing and condemned, by the unalterable usages of society, to a state of degradation."⁵⁸ Edward Everett described their condition as one of "disability, discouragement

⁵⁶ Ibid., vol. xv, pp. 178-180.

⁵⁷ Ibid., vol. xviii, p. 221.

⁵⁸ Ibid., vol. xx, pp. 294-296.

ment, and hardship."⁵⁹ Reverend John Orcutt, of Connecticut, a traveling agent of the Society, reported:

Not only are free negroes forbidden to come into Indiana by express statute, but it is made a penal offense for a white person to induce such immigration. . . . When a State constitution was adopted in Oregon, four-fifths of the electors said by their vote we will not have slavery! and they also said by about the same majority, "we will have no free negroes!" Illinois too, has a similar prohibitory law against free negroes. . . . Already in the Eastern States, the black man finds himself on equal footing with the whites *nowhere*, except in the State prisons, where he is on the same level, and fully represented! No wonder that some of the free colored people at the North should begin to inquire with solicitude what they shall do. I saw several at the West who said, "We must go somewhere!"⁶⁰

[Up to 1830 the opinion prevailed throughout the United States, unless, indeed, we except Georgia and South Carolina, that, both for the sake of the free and unhampered development of his possibilities, and for the purpose of stimulating more frequent emancipations, the free negro must be sent to a home without the limits of any one of the States.⁶¹ And scores of slaveholders after 1817 offered liberty to their slaves on the condition of their willingness to emigrate to Liberia.] John A. Dix, speaking before the New York State Colonization Society, in 1830, said: "The mass of crime committed by Africans is greater, in proportion to numbers, in the non-slaveholding than in the slaveholding States; and as a rule the degree of comfort enjoyed by them is inferior. This is not an argument in favor of slavery; but it is an unanswerable argument in favor of rendering emancipation and colonization co-extensive with each other."⁶²

⁵⁹ Address at Annual Meeting, American Colonization Society, Jan. 18, 1853.

⁶⁰ Minutes of Board of Directors of American Colonization Society, MS., Jan. 16, 1861.

⁶¹ Origin, Constitution, and Proceedings of American Colonization Society, MS., vol. i, pp. 120-121; vol. i, pp. 127-128; African Repository, vol. i, p. 89, reprint from the Albany Argus; vol. i, p. 182 ff., reprint from Niles Register; vol. i, p. 285; vol. v, p. 4, speech of Clay before the Kentucky Colonization Society, Dec. 17, 1829; vol. v, pp. 50-55; vol. vi, pp. 144-147; vol. xiii, p. 38; vol. xxi, pp. 145-149; 27th Cong., 3d sess., H. Rept. No. 263, *passim*.

⁶² African Repository, vol. vi, pp. 163-169.

One or two quotations, from many that could be given, will illustrate the point of view from which a large class of Southern slaveholders looked at the problem of emancipation. Reverend C. J. Gibson wrote from Petersburg, Virginia:

I have belonging to me two families of servants, whom I am anxious to emancipate, if, by any means, I can settle them in Liberia. The duties of the Holy Ministry, . . . , render me utterly unfit to be a faithful Christian Master and incline me to desire this step for the benefit of my own highest interests and those of my sacred office. At the same time, I feel bound to consult the best good of my servants, and in releasing them from my care, to place them in a situation, where the blessings of freedom may *really* be enjoyed. This, I am very sure, cannot be found in our own country, and I am therefore determined not to free them unless they can be sent to Africa.⁶³

It will not be without interest or profit to read the following letter from an unlearned Southern slaveholder:

Dear Sir at the Death of my Father I inherited a Negro boy by Name (Moses) from his Est. and by Misfortunes and the Imprudence of my Youth I had to sell him Some year or two after which Time. I sought and found the Lord precious to my Immortal Soul Soon after this Happy Change the Grace of God began to Shed Light upon my mind I read the Holy Laws of God and found therein this Command do to Others as you would Others Should do to you I then began to Ask My Self if I had of been Moses' Slave and he my Master if I would have had him to of Sold me to a man who would have kept me in Slavery all my days on Earth and Perhaps without the Comforts of Life and in Perfect Ignorance and degradation. I readily answered the Question and determined by the Help of God to buy Moses if ever I Got able if he would agree to go to the Colony Settled on the Shores of Africa I was at that Time Very Poor as to this World's Goods I however went to work and after some Years Toil I found I had the means to Buy Moses I saw him and Talked with him about going to Africa and he declined I then Told him I would leave him to consider on the Subject and when ever he got his Consent to go I would buy him but that I would buy him on No Other Terms as I did not wish to own any Slaves Some Year or two pass'd by when Early one Morning Moses made his appearance at my door and Told he wanted me to buy him I ask'd him if he had Consented to go to the Colony he said if I would buy him he would go but he had rather Stay with me I told him I would only buy him on the Conditions he would go to the Colony (and then bought him he was then Quite a Prayerless Wicked Man I thought it would be best for him that I would keep him a year or two and try by the assistance of the Lord to be Instrumental in his Salvation in 12 or 18 Months after he Profess'd

⁶³ Letters of American Colonization Society, MS., Gibson to Gurney, Jan. 26, 1844.

the Religion of the Savior Since which Time say 12 or 18 Months he has to all Human Appearance been a Very Pious Man and I do hope and think he is now traveling that Road that Leads to the fair Climes of Immortal Joys. I have been Striving in my poor way to do my duty to this poor Coloured Man the Time has Arrived when I think I ought to send him on to the Colony and although he is a poor Colour'd Man I feel distress at Parting with him but a sense of my duty urges me and I now wish to get Some Instruction and assistance from You by what Vessel I can send him and from what place and at What Time will it start and for what Settlement I want him Carried to a Healthy Settlement what Implements is necessary and what Kind of Clotheing and how Shall I get him to the place where the Vessel is to Sail from and to whom Shall I direct him to be put in the Care of and what Shall I do with the Money I give him to Carry with him Your kind Instruction in this Matter will Very Much Oblige yours with Much esteem

SAMUEL O. MOON.⁶⁴

A Kentucky slaveholder, whose slaves had been left behind, when a vessel sailed with emigrants to Liberia wrote to the Colonization Society: "*I cannot be a slaveholder. I must get rid of my slaves in some way. To set them free in Kentucky I cannot and will not. I fear I shall have to adopt the revolting expedient of selling; I dread this but I must do something.*"⁶⁵ W. M. Atkinson, of Virginia, believed that, because of the necessity of preserving the safety of the whites, Virginia would never give up slavery unless provision should be made for the removal of the blacks.⁶⁶ A similar opinion was expressed by General Bayly, of the same State.⁶⁷

The idea of the colonization of the negro sprang full grown from the brain of no individual. Henry Clay thought that it was the product, not of the minds of men, but of the very requirements of the times, because it was "an obvious remedy." As early as 1773 a correspondence was begun between Doctor Samuel Hopkins, of Rhode Island, and Reverend Ezra Stiles, later President of Yale College. Hopkins desired to send two or three negroes of Rhode Island to the coast of Guinea. Stiles thought that not fewer than thirty or forty could be profitably sent. The

⁶⁴ Ibid., Moon to Gurley, August 17, 1835.

⁶⁵ Ibid., Triplett to W. McLain, Jan. 16, 1846.

⁶⁶ Ibid., Atkinson to Gurley, Sept. 27, 1831.

⁶⁷ African Repository, vol. xiv, pp. 119-120.

purpose of these men, however, was purely missionary; they did not discuss the desirability of transporting the free colored population back to their native land, although it is evident that Doctor Stiles thought one effect of such a settlement on the coast of Africa might be to have some influence in putting an end to the African slave trade.⁶⁸ The Revolutionary War cut short all hopes of carrying out these plans. In 1777 a committee of the Virginia Legislature, of which Jefferson was chairman, proposed the gradual emancipation of slaves, and, at the same time, their exportation.⁶⁹

There can be no doubt that between 1785 and 1817, Doctor William Thornton exerted a powerful influence in favor of colonization. He was in correspondence with British leaders in the movement for the transportation of their blacks, and which, under the direction of Granville Sharpe and others, resulted in the establishment of the British colony of Sierra Leone on the West coast of Africa. In an undated letter "To the Black Inhabitants of Pennsylvania, assembled at one of their stated meetings in Philadelphia," he wrote:

It is in contemplation by the English to make a free settlement of Blacks on the Coast of Africa, which they have already begun. . . . They are desirous of knowing if any of the Blacks of this country be willing to return to that Region which their fathers originally possessed, and finding many in Boston, Providence and Rhode Island very anxious of embarking for Africa, wish also to be informed if any of the Blacks in Pennsylvania are inclined to settle there.⁷⁰

Indeed, soon after the preliminary meeting which resulted in the organization of the American Colonization Society, Thornton wrote to Henry Clay that, during the winter of 1786-87, while traveling in Rhode Island and Massachusetts, he found many free blacks and became deeply interested in them. He had already corresponded with friends, members of the Sierra Leone Society, and he became anxious to know whether the free blacks of those two States desired

⁶⁸ Literary Diary of Ezra Stiles, vol. i, pp. 363-364.

⁶⁹ African Colonization, "An Inquiry into the Origin, Plan, and Prospects of the American Colonization Society," p. 4.

⁷⁰ Thornton Papers, MS., vol. xiv. Pages not numbered.

to be transported to the British Colony. He had a meeting called, at which hundreds of that class were present, and he was later informed by them that 2,000 of them would go. The Massachusetts Legislature seemed interested, and many members promised liberal aid, until they heard that he proposed to settle the emigrants under British protection. They desired the settlement to be made "in the most southern part of the back country between the whites and Indians." To this scheme Thornton objected.⁷¹ Thornton assures us, however, that about the year 1788, "the Americans in New England were desirous of sending all the free blacks from that country, and offered ships and every necessary for their support."⁷² Thornton himself at one time had made many preparations to go to Africa to superintend such a colony; but his plan did not materialize.⁷³ Doctor Hopkins, whose letter to Stiles is quoted above, was, in 1789, in correspondence with Thornton on the subject of colonization; and in 1791 he made an effort to secure the incorporation of the Connecticut Emancipation Society, one of whose objects was the colonization of free blacks.⁷⁴

In December, 1800, the Virginia Legislature requested Governor Monroe to correspond with the President of the United States "on the subject of purchasing lands without the limits of this State," whither obnoxious persons might be sent. This resolution was called forth by a conspiracy of slaves in or near Richmond. By law the conspirators were guilty of a capital offence; but the Legislature proposed transportation, as an act of clemency. This correspondence was productive of no material results. But the following year the Legislature directed the Governor to continue the correspondence, suggesting this time that it might be desirable to locate a colony outside the limits of the United States, a view in which President Jefferson fully

⁷¹ *Ibid.*, vol. xiv, letter to Clay, no date.

⁷² *Ibid.*, vol. xiv, no name, no date.

⁷³ Letters of American Colonization Society, MS., Mrs. Anna M. Thornton, Jan. 18, 1831.

⁷⁴ Half-Century Memorial, American Colonization Society, 1867, pp. 62-65.

concurred. The essential difference between these two Virginia resolutions was that the first contemplated merely the establishment of a penal colony, while the second proposed to provide an outlet for the whole of the free black population, and to provide for those who desired to emancipate their slaves an opportunity to do so without danger to the State. President Jefferson corresponded, though without success, with the British authorities regarding the incorporation of the free blacks of this country into the Sierra Leone colony.⁷⁵

Samuel J. Mills of Connecticut, deservedly called the father of the foreign missionary enterprise in the United States, came to the conclusion, after a tour of the South-western part of the United States, that "we must save the negroes, or the negroes will ruin us." He thought the South at that time so well disposed towards the negro as to be willing to enter heartily into a colonization scheme.⁷⁶

Paul Cuffee, a negro sea captain, a resident of Massachusetts, and the son of a native African who had been sold into slavery but who had later secured his own freedom, transported from the United States to Africa thirty-eight persons of color, probably the first company of negro emigrants whose object was resettlement in the land from which they or their fathers had come. The expense of the voyage, nearly \$4000, was borne by Cuffee himself and the negroes were taken for settlement to the Sierra Leone colony. From the point of view of actual accomplishment the name of Paul Cuffee must find a place on the list of those whose efforts and whose views made possible the organization of the American Colonization Society, although his company set sail in 1815, almost two years before the formal organization of the American Colonization Society, and the voyage was undertaken upon Cuffee's personal responsibility and

⁷⁵ Mathew Carey, *Reflections*, p. 6; *Half-Century Memorial, American Colonization Society, 1867*, pp. 62-65.

⁷⁶ *Half-Century Memorial, American Colonization Society, 1867*, pp. 66-68.

without cooperation or help from either the government or any philanthropic association.¹⁷

Reverend Robert Finley of New Jersey has generally been considered the father of the American Colonization Society. If by this it is meant that he, more than any other man, brought about the meeting which resulted in the organization of that Society, no violence is done to truth; although it could with equal justice and probably more accuracy be said that the Society was the result of the efforts of Thornton, Mills, and Finley, north of Mason and Dixon's line, and of Charles Fenton Mercer, Francis Scott Key, and E. B. Caldwell, south of that line.

At least as early as February, 1815, Finley had become deeply interested in the organization of a colonization movement. He talked of colonization, wrote of colonization, made a visit to Washington in the interest of colonization, and led in the movement which resulted in a public meeting at Princeton in furtherance of the plan. But while he had been at work in New Jersey, Mercer had not been idle in Virginia. Each, it seems, worked at this time independently of the other. Mercer had been elected a member of the Virginia Legislature. He had learned of the two resolutions passed by that body on the subject of colonization, in 1800 and 1802—both passed under a pledge of secrecy. Mercer was not under this pledge, and he published abroad the action taken at that time. A new interest was aroused. He secured the passage of a resolution which met, in most respects, the views of Doctor Finley. This resolution was passed in the Senate with but one dissenting vote, and in the House by a vote of 132 to 14.¹⁸ The governor was thereby instructed to correspond with the President of the United States for the purpose of obtaining territory upon the coast of Africa, or upon the shore of the North Pacific, or at some other place, "to serve as an asylum for such

¹⁷ J. W. Lugenbeel, *Sketch of the History of Liberia*, MS.

¹⁸ *Half-Century Memorial, American Colonization Society, 1867*, pp. 68-71; Carey, *Reflections*, p. 6; *African Colonization, "An Inquiry into the Origin, Plan, and Prospects of the American Colonization Society,"* pp. 4-5.

persons of colour as are now free, and may desire the same, and for those who may hereafter be emancipated within this commonwealth."⁷⁰ While Finley and Mercer worked in New Jersey and Virginia, Key was at work in Maryland, and Doctor E. B. Caldwell, a brother-in-law of Finley, was busy in the District of Columbia; and when it was proposed to hold a meeting in Washington, December 21, 1816, the leaders were thoroughly interested and, to a degree at least, the public mind had been prepared.

And now by way of summary. In 1815 New England recognized the evil of slavery to be a national evil. New England felt the responsibility of helping, not driving, the South to get rid of that institution. Cooperation, not antagonism, was to be the means employed by each section in its relations with the other. To the upper South slavery was a *problem*, because it had grown to be one of those underlying bases in the economic life of the South; because its immediate abolition would mean, in many cases, a sudden change from affluence to poverty; because it was sincerely believed that the sudden emancipation of many thousands of slaves in the South would be an added cruelty to the class of improvident free negroes; because of the very fact that the liberation of one slave meant the addition of one free negro. For the free negro was also a problem. He was a problem because of the instances in the mind of every tolerably read Southerner, of outrages and insurrections of the blacks against the whites, in countries in which the population of each was not greatly unequal; because of the opinion that prevailed in every part of the Union that the negro could never rise to the limit of his possibilities so long as he remained in this country; because in his degraded condition he was a source of danger, only and always, to the community in which he lived. These were the problems, and together they made up the great negro problem of that time. There were four solutions proposed: (1) the immediate and unconditional abolition of slavery; (2) the perpetuation of slavery as long as possible; (3) the policy

⁷⁰ *African Repository*, vol. i, pp. 249-251.

of non-interference with the natural course of events; (4) colonization.

The first of these proposed solutions was supposed to be, and was, utterly impracticable, the paramount importance of the preservation of the Union from a dissolution, either actual or seriously attempted, being at once taken for granted. For it is utterly impossible to reconcile with the statements of either the leaders or the leading opponents of Garrisonian Abolition the statement of Professor A. B. Hart that "it must not be supposed that . . . even the [anti-slavery] agitators realized that slavery had the latent power of dividing the Union and bringing about civil war." Time and again they were warned of just this latent power; and the Garrisonians expressed their satisfaction with the result, should that result be even the dissolution of the Union.

The second proposed solution was as impracticable as the first. The institution of slavery was doomed to die. The question of prime importance was, not whether or not slavery could continue to exist as a system, but what form its destruction should take. The Garrisonians and the cotton gin had not yet filled the upper South with a lingering wish that it might survive, and a lingering hope that it would. In 1815, the leaders of thought in the upper South were definitely set against the second proposed solution.

The third was so seldom advocated by men of pronounced influence, that a consideration of its merits is unnecessary, in this study.

Unquestionably, the one supposed solution to which the leaders of thought in every part of the Union, except possibly the extreme South, turned was that of colonization. The free negro would be transported to the land whence his fathers came; the danger from the alarming increase in the free negro population would vanish as ghosts vanish with the coming of the morning; slaveholders could then safely and gradually emancipate their slaves, and the negro problem would be solved. And now let us consider the channel through which the experiment was made.

CHAPTER II

ORGANIZATION, PURPOSE, AND EARLY YEARS OF THE AMERICAN COLONIZATION SOCIETY

As a result of the efforts of the brothers-in-law, Rev. Robert Finley of New Jersey, and Dr. E. B. Caldwell of Washington, a meeting was held in that city December 16, 1816. The general purpose was the discussion of negro colonization. Bushrod Washington presided, and among the speakers were Henry Clay and John Randolph of Roanoke. Five days later a second meeting was held, presided over by Clay. Among resolutions adopted, the following is of interest:

The situation of the free people of colour in the United States has been the subject of anxious solicitude, with many of our most distinguished citizens, from the first existence of our country as an independent nation; but the great difficulty and embarrassment attending the establishment of an infant nation when first struggling into existence, and the subsequent great convulsions of Europe have hitherto prevented any great national effort to provide a remedy for the evils existing or apprehended. The present period seems peculiarly auspicious to invite attention to this important subject, and gives a well grounded hope of success. The nations of Europe are hushed into peace; unexampled efforts are making in various parts of the world to diffuse knowledge, civilization, and the influence of the Christian religion. . . . Desirous of aiding in the great cause of philanthropy, and of promoting the prosperity and happiness of our country, it is recommended by this meeting, to form an association or Society for the purpose of giving aid and assisting in the colonization of the free people of colour in the United States.¹

E. B. Caldwell, John Randolph, Richard Rush, Gen. Walter Jones, Francis Scott Key, Robert Wright, James H. Blake, and John Peter were appointed to present a memorial to Congress, requesting federal aid in procuring territory in Africa or elsewhere for the carrying out of their design; Key, Washington, Caldwell, James Breckenridge,

¹ Origin, Constitution, and Proceedings of American Colonization Society, MS., vol. i, pp. 1-3.

Gen. Walter Jones, Rush, and W. G. D. Worthington were appointed to prepare a constitution and rules.

At a third meeting, December 28, there was adopted a constitution, in which the sole object of the organization was stated to be "to promote and execute a plan for colonizing (with their consent) the Free People of Colour residing in our country, in Africa, or such other place as Congress shall deem most expedient. And the society shall act to effect this object, in cooperation with the General Government, and such of the States as may adopt regulations upon the subject."² A president, eight vice-presidents, a secretary, a treasurer, and a recorder were to be chosen. A board of managers, composed of these officers and twelve other members of the Society, was to constitute the central organization. Societies organized in the United States, working with the same object as that of the parent Society, and contributing to the funds of the central treasury, were to be considered auxiliary to it.

A great deal has been written regarding the ulterior motives of those who in its early days controlled the Society. Yet, even during the bitter decade from 1830 to 1840, *The Liberator* admitted many a time the sincerity of motive and the nobility of design of those whose active interest brought the Colonization Society into being. The quarrel was not brought about, it was said, because the movement had been dug up out of the miry clay; it was rather because it had cast itself down from the height on which it was born. It will, therefore, be safe to assume that those leaders who have left behind them a record of the motives of both themselves and their coadjutors, have spoken from their hearts.

No more credible witnesses could be found to represent respectively, the northern and southern portions of the Middle Atlantic States than Robert Finley, of New Jersey, and William H. Fitzhugh, of Virginia. Finley, whose State was not burdened with the problem of slavery, looked at the Society from the point of view of the welfare of the

² *Ibid.*, vol. i, pp. 4-9.

free negro. Fitzhugh, a splendid example of the influential Virginia slaveholder, the owner of three hundred slaves who were by his will emancipated and offered special inducements if they would consent to go to Liberia, heartily and sincerely opposed human slavery, and yet, with others, saw that an epidemic of smallpox could not be relieved by abusive letters to the victims by a member of the health board. The South, to him and to others, was rather another Prometheus Bound, waiting for a deliverer. He saw that the abolition of slavery, if it was to come peaceably, must come gradually; that unconditional and immediate abolition would be accompanied by a national upheaval and a radical readjustment. Of Finley's motive, he himself wrote in 1815:

The longer I live to see the wretchedness of men, the more I admire the virtue of those who devise, and with patience labor to execute, plans for the relief of the wretched. On this subject, the state of the *free blacks* has very much occupied my mind. Their number increases greatly, and their wretchedness too, as appears to me. Everything connected with their condition, including their color, is against them; nor is there much prospect that their state can ever be greatly ameliorated, while they continue among us. Could not the rich and benevolent devise means to form a Colony on some part of the Coast of Africa, similar to the one at Sierra Leone, which might gradually induce many free blacks to go and settle, devising for them the means of getting there, and of protection and support till they were established.³

Fitzhugh wrote in 1826:

Our design was, by providing an asylum on the coast of Africa, and furnishing the necessary facilities for removal to the people of colour, to induce the voluntary emigration of that portion of them already free, and to throw open to individuals and the States a wider door for voluntary and legal emancipation. The operation, we were aware, must be—and, for the interests of our country, ought to be gradual. But we entertained a hope, founded on our knowledge of the interests as well as the feelings of the South, that this operation, properly conducted, would, *in the end*, remove from our country every vestige of domestic slavery, without a single violation of individual wishes or individual rights.⁴

Reverend William Meade, later bishop of Virginia, who was the first agent of the Society, and to whom slavery was

³ North American Review, vol. xxxv, p. 119.

⁴ African Repository, vol. ii, pp. 254-256.

an "accursed evil," said in 1825 that, in addition to the purpose of the leaders in the colonization movement, as stated in the constitution, the Society

hopes to show to the pious and benevolent how and where they may accomplish a wish near and dear to many hearts, which is now impossible; it hopes to point out to our several legislatures, and even to the august council of this great nation, a way by which, with safety and advantage, they may henceforth encourage and facilitate that system of emancipation which they have almost forbidden.⁵

As early as 1819 such formidable opposition had reared its head, from extremists of both the pro-slavery and the anti-slavery parties, that the managers of the Society officially denied that their design was either "to rivet the chains of servitude" upon the negroes at the South, or "to invade the rights of private property, secured by the constitution and laws of the several slave-holding States."⁶ Indeed, it is a significant fact, and worthy of note at this point, that during the whole period from 1820 to the issuance, by Abraham Lincoln, of the Proclamation of Emancipation, the bitterest opponents Colonization had were those strange bedfellows—New England and South Carolina. If the opposition from New England was more pronounced than that of the Carolinians it was largely because of the fact that the former was better organized. It is very probable that never, in any section, did Colonization have so few friends as in South Carolina and Georgia. Again and again the Society was called upon to repeat its original denial, and always with as little effect.

The reason is obvious. Colonization was essentially a moderate, a middle-State movement, counting among its supporters the moderate men of every part of the Union. The idea that called it forth was a middle-State idea. Extremists of the far North and the far South were unable to enter into its feelings. As is likely to be the case in all compromise movements, extremists on either side magnified possible objections into actually base designs. The whole

⁵ Ibid., vol. i, pp. 147-150.

⁶ Origin, Constitution, and Proceedings of American Colonization Society, MS., vol. i, pp. 65-74.

history of Colonization contains conclusive evidence that those leaders who actually directed the affairs of the organization, where they deviated at all from the design of the Society, as expressed in its constitution, deviated consistently on the side of emancipation. If those who hesitate to admit the purity of their designs would go to the trouble of investigating the evidence that remains, they would probably accept the defense of the Board of Managers in 1823, that "they have persevered, confident that their motives will one day be duly appreciated, and trusting their cause to the ruler of the world."⁷

Sentiments of friends and leaders, and reasons given by individuals for favoring the Colonization scheme, cover a wide range—from that of Gerrit Smith, who said, while yet a member of the Colonization Society, "We are all abolitionists at the north,"⁸ to that of a friend from Canton, Ohio: "Among the multitude carried away by the floods of abolitionism, I remain an unwavering friend of the Colonization *mode*, of abolishing slavery in the United States,"⁹ and to that of the Albany Argus:

It seems to be the middle ground, upon which the several interests throughout the country, in relation to slavery, can meet and act together. It appears, indeed, to be the only feasible mode by which we can remove that stigma, as well as danger from among us. . . . Gradual emancipation . . . , under the advantages of a free government, formed, in their native land, by their own hands . . . is the only rational scheme of relieving them from the bondage of their present condition.¹⁰

But those who desire to consult a proslavery collection of letters could not profitably spend their time among the records of the American Colonization Society, where, of many thousands of letters, probably not a dozen, written prior to 1846, attempted a defence of the principle of slavery.

The organization of the Society was completed January 1, 1817, when Judge Bushrod Washington was elected

⁷ Ibid., vol. i, pp. 199-200.

⁸ Letters of American Colonization Society, MS., G. Smith to Walter Lourie, Albany, N. Y., Dec. 31, 1834.

⁹ Ibid., Geo. Sheldon to Gurley, Canton, Ohio, Aug. 2, 1836.

¹⁰ African Repository, vol. i, p. 89.

President, the following being elected Vice-Presidents: William H. Crawford of Georgia; Henry Clay of Kentucky; William Phillips of Massachusetts; Col. Henry Rutgers of New York; John E. Howard, Samuel Smith, and John C. Herbert, all of Maryland; John Taylor of Caroline, in Virginia; Gen. Andrew Jackson of Tennessee; Robert Ralston of Pennsylvania, and Richard Rush, of the same State; General John Mason of the District of Columbia, and Rev. Robert Finley of New Jersey. The foregoing, with E. B. Caldwell, Secretary, W. G. D. Worthington, Recorder, David English, Treasurer, and Francis Scott Key, Gen. Walter Jones, John Laird, Rev. James Laurie, Rev. Stephen B. Balch, Rev. Obadiah B. Brown, James H. Blake, John Peter, Edmund J. Lee, William Thornton, Jacob Hoffman and Henry Carroll constituted the Board of Managers. On the list of first contributors to the efforts of the Society appear the signatures, among others, of Henry Clay, John Randolph of Roanoke, William Thornton, Daniel Webster, William Dudley Diggs, Samuel J. Mills, Richard Bland Lee, John Taylor of Caroline and Bushrod Washington.¹¹

Within a fortnight of the organization of the Society, a memorial was presented to both Houses of Congress, calling attention to the condition and prospects of the free colored population, calling attention also to the fact that, in order to safeguard themselves against what might prove dire consequences, important slaveholding States had adopted measures to restrict the further growth of the evil, by the enactment of laws prohibiting emancipations within the State. The memorialists consider the right of emancipating slaves "a right which benevolent or conscientious proprietors had long enjoyed under all the sanctions of positive law, and of ancient usage," and suggest as a more satisfactory solution of the problem, that adequate provision be made for the establishment of such a colony as the Society later established. The subject of the colonization of Africa was presented in its varied aspects: as a movement for ridding the

¹¹ Original List of Subscribers, MS.

United States of a separate caste or class, dangerous to the peace and safety of the country; as an important factor in the elevation of the free negro, who, it was believed, could never rise to his possibilities in the United States; as an instrument for the spread of civilization in Africa, and as promising much as a missionary enterprise. Pickering, for the House Committee on the Slave Trade, reported favorably, urging that the free negro, when colonized, should be sent where he would never provoke friction with the whites. Africa was considered the most desirable place for the realization of this object. The committee expressed its belief that the civilized powers should engage and assent to "the perfect neutrality of the colony." It was believed that arrangements might be made, whereby the colony might be incorporated with that at Sierra Leone. A resolution, not acted on at that session of Congress, was recommended, directing that the United States open negotiations with other powers for the abolition of the slave trade, and with Great Britain for the reception into Sierra Leone of "such of the free people of color of the United States as, with their own consent, shall be carried thither." In case no such arrangement could be made, it was recommended that the United States should seek to obtain from Great Britain and the other maritime powers a guarantee of "permanent neutrality for the formation of such a colony."¹²

In October, a committee was appointed to interview President Monroe who, during the whole term of his presidency, actively cooperated with the Society.¹³ In November, Rev. Samuel J. Mills and Ebenezer Burgess were appointed the Society's first agents to Africa. They were directed to go by way of England and secure there such information as they could, that would be helpful in the selection of territory favorable for the proposed colony.

¹² 27th Cong., 3d Sess., H. Rept., no. 283, pp. 208-213. J. P. Kennedy's Report. This is a most valuable document on colonization and the slave trade. By some, it was considered the most important House Report of the session.

¹³ Journal of Board of Managers of American Colonization Society, MS., October, 1817.

From there, they were to proceed to the West Coast of Africa for the purpose of exploration and of ascertaining the best situation for the establishment of such a colony as the Society contemplated. They were to observe the climate, soil, etc., of such parts of the coast as they visited, "as it is in contemplation to turn the attention of the new colonists mostly to agriculture."¹⁴ On the return voyage Mills died.

At the annual meeting, January 1, 1818, President Washington reported a growing interest in every part of the Union in favor of the Society; also a respectable subscription from a "small but opulent society of slave-holders in Virginia." Further, it was stated:

Should it [the Society] lead as we may fairly hope it will, to the slow but gradual abolition of slavery, it will wipe from our political institutions the only blot which stains them; and in palliation of which, we shall not be at liberty to plead the excuse of moral necessity, until we have honestly exerted all the means which we possess for its extinction.¹⁵

During this first year, also, auxiliary societies had been formed in Baltimore, Philadelphia, New York, Virginia, and Ohio.¹⁶

Already, by 1819, one happy result of the Society's efforts was seen in an act passed by the State of Georgia. It was an act providing for the disposal of slaves illegally imported into the State. Such slaves, if captured, were to be considered the property of the State and were to be sold at auction, provided that, in case the Colonization Society agreed to transport such negroes to such foreign colony as the Society might have established, the negroes, after payment by the Society of all expenses incurred by the State in connection with them, were to be transferred to the Society.¹⁷ This was the beginning of a crusade against the African slave-trade, and from this time until that trade had ceased,

¹⁴ Minutes of Board of Managers of American Colonization Society, MS., Nov. 5, 1817.

¹⁵ Origin, Constitution, and Proceedings of American Colonization Society, MS., vol. i, pp. 20-23.

¹⁶ Ibid., vol. i, pp. 23-30.

¹⁷ Ibid., vol. i, pp. 65-74.

the Society's existence would have been amply justified if it had accomplished nothing beyond its influence against that inhuman traffic. It is believed that Charles Fenton Mercer, "the Wilberforce of America," was inspired by his interest in African colonization to wage, in Congress, a warfare against the African slave trade such as was waged by no other American. The Anti-Slave-Trade Act of 1819 was the outcome of a memorial from the Board of Managers of the Colonization Society.¹⁸ In the annual report of the Board of Managers, 1819, the efforts of the managers are stated to be directed to "the happiness of the free people of colour and the reduction of the number of slaves in America."¹⁹

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In January, 1819, a letter from the Colonization Society was presented in the House of Representatives. The efforts of the Society in sending out Mills and Burgess were noted, and it was stated that, although the Society owed its origin to philanthropic individuals, its purposes could not be satisfactorily realized and its success could not be complete unless it had the support of the Federal government.²⁰ Probably the greatest single disappointment the Society ever experienced was in the continued refusal of the Federal government to appropriate funds for the carrying out of the chief purpose of the Society; the transportation and settlement of free persons of color on the west coast of Africa. Year after year memorials were presented; year after year favorable reports were read from House committees to which the memorials were referred; and year after year Congress refused to make an appropriation. There can be no doubt that when the Society was formed, it looked to the Federal government for aid in its undertaking.²¹

This disposition to leave the Society to work out its own program and collect, as best it could, the funds that were

¹⁸ Ibid., vol. i, p. 88.

¹⁹ Ibid., vol. i, pp. 65-74.

²⁰ 27th Cong., 3d Sess., H. Rept. no. 283, pp. 223-225.

²¹ Origin, Constitution, and Proceedings of American Colonization Society, MS. See Original Constitution.

necessary, was not shared by President Monroe. When the Anti-Slave-Trade Act of 1819 was passed, he construed it liberally and, in cooperation with the managers of the Colonization Society, sent out Agents of the United States to select on the west African coast a territory on which recaptured Africans might be landed and cared for by the government.²² The first material result of this cooperation was the chartering, in 1820, of the *Elizabeth* by the government, and her departure from New York with Rev. Samuel Bacon and John P. Bankson, government agents, Samuel C. Crozer, agent for the Colonization Society, and eighty-odd free negroes. Going by way of Sierra Leone, the company landed on Sherbro Island where, by the first of June, the three agents and twenty-four of the settlers had died.²³

So much has been said of the unhealthfulness of the territory to which the Society's first negroes were sent, that it will be fitting here to record the facts as they were presented by the colonial agents. As years added to the experience of those who directed the settlement, it was observed that the cases of African fever through which most of the immigrants passed were less frequent and less violent among those who arrived during the dry than among those who arrived during the rainy season. But this lesson had to be learned and, although the Abolitionists of the Garrisonian school and their apologists have depicted in glowing terms the wretchedness of the free negro, "expatriated" and sent off, out of the way, to die of African fever, it is yet true that if the number of deaths among the Liberian colonists be compared with the number of deaths among the settlers of either Virginia or Plymouth, the comparison is highly favorable to the Liberians and the Colonization Society, and this notwithstanding the fact that the African colonists as a class were imprudent in observing even the essentials of personal hygiene.²⁴ They insisted on eating, when they should have abstained from food. They

²² 27th Cong., 3d Sess., H. Rept. no. 283, p. 2.

²³ Lugenbeel.

²⁴ *African Repository*, vol. xv, p. 306.

exposed themselves needlessly and carelessly and, in spite of the most earnest efforts on the part of the Society and its physicians in the colony, the death-rate figures were eagerly used to stir up opposition among the New Englanders.

In 1832 the Board of Managers went carefully into a consideration of the actual number of deaths, the causes of death, and the possibility of decreasing materially the death-rate. A committee appointed for that purpose reported that since 1820, twenty-two expeditions had gone out from the United States to Liberia. On the first eighteen of these, 1487 emigrants had been transported. Of these, two hundred and thirty had died from diseases of acclimation, from fever and diseases consequent upon it. The conclusion reached was that the three most fruitful causes of death were, in descending order: (1) the transportation to Africa of persons who had become accustomed to the high or mountainous country in the United States, (2) the settlement of immigrants too close to the coast and in the heart of the malarial district, (3) the arrival of immigrants at the wrong time of the year. While, of those persons who left the high, and non-malarial sections of the United States, one out of every two and one-fourth died; of those who left the malarial sections of the United States, only one out of every twenty-seven died. Of those landed at Monrovia, a settlement in the malarial section, one out of every five died; while, of those landed at Caldwell, further from the coast and having a greater elevation, one in every fourteen died. Of those transported to Liberia during the rainy season, one out of every four and one-third died; while, of those transported during the dry season, only one out of every six and two-thirds died.²⁵

Thereafter, the Society used every reasonable precaution within its power to prevent sickness, to care for those who were sick, and to cut down the death-rate—and with success.

²⁵ Minutes Board of Managers of American Colonization Society, MS., May 7, 1832, vol. ii, p. 273 ff.

But there can be no doubt that the climate was much more severe in its effects upon the health of the white man than upon that of the black. Indeed, every white agent who went out, from the first expedition until the independence of the Republic of Liberia was declared, took his life in his hands and knew very well that the odds were greatly against not only his health, but his life. Mills, Bacon, Crozer, Bankson, Andrews, Winns and his wife, Randall, Anderson, Skinner and his wife, Ashmun and his wife, Buchanan—heroes and heroines these—and Ashmun and Buchanan the greatest of them. Men and women who, like these, lay down their lives voluntarily upon the altar of service, are not to be charged with selfishness or the desire to perpetuate a system against which they spoke and labored eloquently.

The sending of expeditions and the sustenance of emigrants required funds. How were the finances to be provided and the enthusiasm spread? The President had gone as far as he could, in keeping with the law of 1819, in cooperation with the Society. By that law, his efforts were confined to the suppression of the slave-trade. No direct appropriation could be secured from Congress. The result was that for many years, indeed, during the whole period covered in this study, the important sources of revenue were: (1) a national system of agencies, (2) receipts from auxiliary societies, (3) bequests and legacies, (4) State appropriations, (5) collections taken by ministers in churches on the Fourth of July each year.

As early as March, 1819, the Managers appointed thirteen agents whose duty it was to collect funds and arouse interest throughout the Union. Among these were General Walter Jones, C. F. Mercer, William H. Fitzhugh, and Francis Scott Key. But the first important general agent of the Society was Rev. William Meade. The origin of the agency is interesting. William H. Crawford, who was presiding at a meeting of the Managers, in April, 1819, called attention to an advertisement he had found in a Georgia newspaper. Thirty or forty negroes had been illegally im-

ported into the State. The law of the State required that they should be sold at auction, unless, by a provision already referred to, they could be taken over by the Colonization Society, and transported to Africa. Meade was at once sent to Georgia to make an effort to save the negroes from slavery.

In May, Meade reported that the Governor had agreed to postpone the sale and "afforded me an opportunity of seeking among the humane and generous of this southern country, the means of their redemption."²⁸ In June he reported that arrangements had been made, by which the negroes were to be turned over to the Society. "Some who had but little hope of our general enterprise declared their willingness to contribute for the ransome of these; and a few who intended to have become the purchasers at this sale, expressed a pleasure at the thought of their restoration to Africa, and proved their sincerity by uniting with the Society at Milledgeville." Under the direction of the most prominent citizens of the State, he had formed three auxiliary societies. At Augusta and Savannah he found similar good feeling toward the Society. Of the negroes at Charleston he says: "their attendance in the church where I was invited to officiate, (and it was the same, I was told, in all the others,) was truly grateful to the soul of the Christian. The aisles and other places in the church set apart for them, were filled with young and old, decently dressed and many of them having their prayer books, and joining in all the responses of the church. I must also beg leave to add a general remark concerning the whole Southern country, in which I am justified by the repeated assurances of the most pious and benevolent that the condition of the negroes is greatly ameliorated in every respect. As to food, raiment, houses, labour, and correction, there is yearly less and less over which religion and humanity must lament." At Georgetown he saw "eight or ten of the most

²⁸ Minutes Board of Managers of American Colonization Society, MS., April 7, 1819; May 4, 1819.

wealthy and influential, and obtained assurances of their cordial co-operation." At Fayetteville "all the citizens prepared for co-operation. I had only to go to their houses and take down their names."

At Raleigh he found "the same unanimity of sentiment. The supreme court being in session, many of the judges and lawyers were collected from the different parts of the State, who cordially joined in the Society, and testified to the general prevalence of good will to it throughout the State. At a meeting for forming a constitution, the highest talents, authorities, and wealth of the State were present, and unanimously sanctioned the measure." From Raleigh, he went to Chapel Hill, the seat of the State University. It was commencement time, and ministers, trustees, and other persons of influence were assembled. "I was happy to find the same feeling here, and that a small society had already been formed." For his agency as a whole, he reported six organized, and ten or twelve prospective, societies. He had secured, in about two months time, subscriptions amounting to between seven and eight thousand dollars. He reported that his success in raising funds would have been greater, but for the fact that "the pecuniary distress is, by universal consent, greater than ever was known. . . . I was told a hundred times that no other cause but this would elicit anything." Of the general feeling in regard to the Society, he reported "a conviction that unless a great alteration takes place; or I have been misinformed, it will meet with a liberal support."²⁷ During the early years of the Society, Rev. William Meade also undertook a local agency in his own county in the Valley of Virginia. He secured subscriptions amounting to almost seven thousand dollars there, his own near relatives contributing, with himself, seventeen hundred dollars.²⁸

In 1825 William H. Fitzhugh, of Virginia, was appointed to go through the Middle Atlantic and New England States

²⁷ Ibid., Report of Meade, June 21, 1819.

²⁸ African Repository, vol. i, pp. 146-147.

in the interests of the Society. Theodore Frelinghuysen, of New Jersey, received an appointment in 1828, as did also Rev. Leonard Bacon, of Connecticut.²⁹ In 1830, the Managers resolved to appoint a permanent agent for the New England States, "who by correspondence, the establishment of auxiliary societies, and an attendance upon the Legislatures of those States shall awaken a more general and active interest in the object and augment the funds of the Society." Whenever desirable agents could be obtained general agencies were created for the lower Middle States, the upper Middle States, the New England States, the Western States, the Southern States, and the Southwestern States. During the years 1838 to 1845 these agencies were by far the most important source of revenue that the Society had.

Thousands of dollars were annually turned over to the funds of the parent Society by the various State and county societies. The organization toward which the Society worked, in its earlier years, was, (1) the parent organization, (2) a State auxiliary society in every State of the Union, (3) societies auxiliary to the State societies, in every county of every State. There was a time when the number of auxiliary societies was about one hundred and fifty.³⁰

Of these, special mention should be made of the Vermont Society, over which the venerable Elijah Paine presided for many years; the Massachusetts Society, among whose foremost members were Joseph Tracy and Simon Greenleaf; the Connecticut Society, with Leonard Bacon, Roger M. Sherman and Governor Tomlinson;³¹ the New York Society, which for years was favored with the services of Dr. Alexander Proudfit and President Duer of Columbia, and which received liberal support from Benjamin F. Butler and, until about 1835, from the philanthropist, Gerrit

²⁹ Board of Managers of American Colonization Society, MS., Sept. 5, 1828.

³⁰ For lists of the auxiliary societies see appendices to the annual reports of the American Colonization Society.

³¹ *African Repository*, vol. v, p. 93.

Smith; the New Jersey Society, with Judge Halsey a leading spirit; the Young Men's Society of Philadelphia, which at times was almost completely under the dominance of that quaint, queer, irrepressible Quaker, Elliot Cresson, who whether at home, or in England, or in Mississippi, or in Vermont, never failed to impress his hearers with his untiring energy, and oftentimes with his utter disagreement with Garrison as to the method of ridding the land of slavery, although he was as anxious as Garrison to get rid of the whole system; the Maryland Society, that counted among its leaders Key, C. C. Harper, John E. Howard, and J. H. B. Latrobe; the Virginia Society, whose President in 1833 was John Marshall, and among whose twelve Vice-Presidents were John Tyler, James Madison, James Pleasants, Hugh Nelson, William H. Broadnax, William Maxwell, and Abel P. Upshur;³² the Loudoun County (Virginia) Society, one of whose Presidents was James Monroe; the Petersburg (Virginia) Society, in which John Early, later a bishop in the Southern Methodist Church, was for years a most active member; also the Societies of Kentucky, Ohio, Louisiana, and Mississippi, the last two of which, for some years, exerted an influence that brought about the liberation of hundreds of slaves, that established a separate settlement at Sinoe in the Liberian country, and counted among their members and leaders, John Ker, John McDonogh, William Winans, and Zebulun Butler. In 1824 there were only twenty auxiliary societies; two years later there were forty-six. From this time the number grew rapidly.³³ By 1838, it seems, auxiliary societies had been organized in every State and Territory in the Union, except Rhode Island, South Carolina, Arkansas, and Michigan.³⁴

Another source of revenue was the subscription of large sums by philanthropists throughout the Union. Mercer was one of the earliest contributors of this class. About 1821 he pledged himself to be responsible for the collection

³² *Ibid.*, vol. ix, pp. 24-25.

³³ *Ibid.*, vol. i, p. 347.

³⁴ *Ibid.*, vol. xiv, p. 100.

of \$5000, with which to begin the active operations of the Society, he to be personally liable for that amount if he failed to secure it by solicitation.⁸⁵ Gerrit Smith, later Abolitionist, proposed, in 1828, that friends of the Society contribute \$100 per year for ten years. The plan became well known as the Gerrit Smith plan. Of \$54,000 contributed on this plan, the New England States gave \$9000, New York, Pennsylvania, New Jersey and Delaware \$14,000, Maryland and the District of Columbia, \$4000; the South \$26,000, and the Northwest \$1000.⁸⁶ One of the contributors on this plan was Gerrit Smith; another, Mathew Carey, also Theodore Frelinghuysen, John McDonogh of New Orleans, John H. Cocke of Virginia, and Courtlandt Van Rensselaer of New York. J. H. McClure, of Kentucky, gave \$1000 per year for ten years. George Hargraves of Georgia, and John Marshall of Virginia gave \$500 each.⁸⁷ Gerrit Smith contributed, besides his contribution on the Gerrit Smith plan, \$5000, when the Society reached a period of extreme need.⁸⁸ Judge Workman of New Orleans left, by will, to the Society \$10,000. Colonel Rutgers of New York left \$1000. "Two Friends" in Georgia left \$500 each.⁸⁹ Childers of Mississippi left a sum which was estimated to be about \$30,000.⁹⁰ James Madison left \$2000 and also the proceeds from the sale of a grist mill and lot.⁹¹ Daniel Waldo and his wife of Boston gave \$24,000 in 1845.⁹²

Soon after the Southampton Insurrection in 1831, and due in large measure to the alarm that was excited by it, the Maryland Legislature provided for an appropriation total-

⁸⁵ Fragment in Gurley's handwriting, MS., in which is copied a letter from C. F. Mercer.

⁸⁶ Life Members, MS.

⁸⁷ Letters of American Colonization Society, MS., Hargraves to Treasurer, Augusta, Ga., June 9, 1833; African Repository, vol. ix, p. 364.

⁸⁸ African Repository, vol. ix, p. 364.

⁸⁹ Ibid., vol. viii, p. 366.

⁹⁰ Letters of American Colonization Society, MS., Gurley to P. R. Fendall, July 16, 1836.

⁹¹ African Repository, vol. xii, p. 237.

⁹² Letters to American Colonization Society, MS., Joseph Tracy to McLain, Boston, Sept. 5, 1845.

ing \$200,000, payable in instalments each year. Because of the independent action of the Maryland Society, the parent organization was deprived of this source of revenue.⁴³ At about the same time, the Virginia Legislature made an appropriation of \$90,000, though certain restrictions as to its application made it almost useless for the purposes of the Society.⁴⁴ In 1850 the Legislature of the same State appropriated \$30,000 per year for five years, on condition that the negroes for whose transportation the fund was to provide were free at the time of the passage of the act, were residents of Virginia, and had already been transported when application was made for the payment of the amount appropriated for such transportation.⁴⁵ In addition to these sources of revenue John McDonogh, by will, left to the Society \$25,000 annually,⁴⁶ and David Hunt of Mississippi left to it \$45,000.⁴⁷

The fifth source of revenue, and it was much more than a mere source of revenue, was the annual Fourth of July collection taken up in churches in almost every part of the Union. In these days, when a most important new light has been thrown upon the forces that have cooperated in the making of history; when, particularly in the study of that generation from 1830 to 1860—a time pregnant with problems and with possibilities, and with historical interpretations—the economic interpretation is monopolizing interest, it has become habitual with students of history to speak and write in terms of cotton production, the cotton gin, the expanding Southwest, and so on. There is very much truth in this from the point of view of the South. But, from the point of view of the North, that busy decade from 1835 to 1845 was the battleground between public

⁴³ *African Repository*, vol. viii, p. 61.

⁴⁴ *Letters of American Colonization Society*, F. Knight to Dr. A. Cummings, vol. iii, no. 738, Aug. 17, 1840.

⁴⁵ *Journal of Executive Committee of American Colonization Society*, 1845-54, March 16, 1850, pp. 139-141.

⁴⁶ *Journal of Board of Directors of American Colonization Society*, MS., Jan. 23, 1851, vol. iv, pp. 90-91.

⁴⁷ *Ibid.*, vol. iv, p. 271.

opinion, so-called, and that opinion moulded by the active and lay ministry, meaning by the lay ministry that body of educational and philanthropic men who, from lecture room or counting house, cooperated with the Christian ministry in forming a distinctly church sentiment. At the beginning of that decade the ministry was leading public sentiment; at the end of it public sentiment was leading the ministry. This is altogether obvious from the correspondence preserved by the Society.

From the organization of the Society in 1817 to the early thirties, the ministry all over New England cooperated splendidly with the Colonization managers, preached annual sermons on Colonization, on or near the Fourth of July, and contributed to the Washington office annually thousands of dollars. At their general conferences and associations they passed with great unanimity resolutions commendatory of the Society, and urged a continuance of the July sermons and collections. Beginning with the thirties, church doors in New England and in many parts of the West were closed to Colonization lecturers and agents, and the reason given, in scores of cases, was not an objection of the minister himself, but his fear that his membership would be displeased if he allowed the use of his pulpit to Colonizationist lecturers. From 1817 to 1830 cooperation and collections from the pew in the New England States were important contributions to the early success of the enterprise.

Among the contributors to the Colonization treasury must be mentioned also the Society of Friends, particularly the Friends of North Carolina who, though comparatively poor, contributed very liberally to the transportation of free negroes. As early as 1820, they paid over to the Society eight hundred dollars.⁴⁸ In 1827 they again contributed the same amount.⁴⁹ Between 1825 and 1830, Masonic

⁴⁸ Journal of Board of Managers of American Colonization Society, MS., May 30, 1820.

⁴⁹ African Repository, vol. ii, p. 351; Journal of Board of Managers of American Colonization Society, MS., Feb. 12, 1827.

Lodge chapters in Maryland, Pennsylvania, Maine, Massachusetts, Columbus and Woodville, Mississippi, also sent in contributions.⁵⁰

But to return to our narrative of the Society's operations. In 1820, the fifteen Vice-Presidents were equally divided between the States south of the border States, the border States, and the States north of those States, five being elected from Georgia, Tennessee, and Virginia; five from Kentucky, the District of Columbia, and Maryland, and five from Pennsylvania, New Jersey, New York, and Massachusetts.⁵¹ Of the funds received by the Society by the time the Elizabeth sailed for Africa, out of a total of \$14,031.50, the States north of the border States had contributed \$2664.67, the District of Columbia and Maryland had contributed \$8466.58, and the States south of the border States had contributed \$2900.25.⁵² If those who already believed that the Society was an organization gotten up by slaveholders for the purpose of getting rid of the free negro, and thereby increasing the value of the slaves that they desired to sell further South, had taken the trouble to think upon these figures, they would have seen that Virginia, the State, above all others, to which their views might have been expected to apply, was sending in contributions that were just about equal to those that came from the States in which slavery had already been abolished; and that the movement was a national, not a sectional one, although its vital energy undoubtedly did come from the middle-State section.

Even before the Elizabeth sailed, the managers went carefully into the question of the practicability of their scheme. They considered the "marrow" of the arguments against colonization to be whether or not the colony proposed could receive and subsist, or the Society transport, all the free

⁵⁰ *African Repository*, vol. ii, p. 353; *Letters of American Colonization Society*, Apr. 21, 1827, May 21, 1827, May 24, 1827.

⁵¹ *Origin, Constitution, and Proceedings of American Colonization Society*, MS., vol. i, pp. 118-119.

⁵² *Ibid.*, vol. i, pp. 150-151.

negroes from the United States. They realized that the colony could not receive, in any one year, more immigrants than could be provided for by the annual surplus products of the colony, including importations. They doubted whether the Society, unaided by the resources of the State or Federal governments, could transport the annual increase in the free negro population, about 5000. But with such governmental aid, they were sure of the success of their undertaking. At any rate, they said, whether accompanied by complete or only partial success, the movement could not but have the most salutary results. As was said at the time:

Although it is believed, and is, indeed, too obvious to require proof, that the colonization of the free people of colour, alone, would not only tend to civilise Africa; to abolish the slave trade; and greatly to advance their own happiness; but to promote that, also, of the other classes of society, the proprietors and their slaves, yet the hope of the gradual and utter abolition of slavery, in a manner consistent with the rights, interests, and happiness of society, ought never to be abandoned.⁵³

If Ohio, with one crop only a year, could add on an average 26,000 a year to her population, could not the west coast of Africa, with two crops a year and a perpetual summer, sustain an average immigration of 5000 from the United States? Indeed, ought it not to be able to sustain the whole of the annual increase of the negro population of the United States, free and slave, which amounted to 40,000? If only the movement would receive cordial support, between America and Africa an interchange of useful articles would take the place of trade in human beings, and

new forms of Government, modelled after those which constitute the pride and boast of America, will attest the extent of their obligations to their former masters, and myriads of freemen, while they course the margin of the Gambia, the Senegal, the Congo, and the Niger, will sing, in the language which records the constitution, laws, and history of America, hymns of praise to the common parent of man.⁵⁴

But these high hopes were disturbed, and it was a gloomy day among the Managers when, in October, 1820, they dis-

⁵³ Ibid., vol. i, pp. 106-107.

⁵⁴ Ibid., vol. i, pp. 107-115.

cussed the prospects for colonization in the light of the distressing news that had come of the large number of deaths among the emigrants carried over by the *Elizabeth*. If there was much likelihood that these conditions would continue, they had no doubt that their efforts on the west coast of Africa ought to be given up without delay. But the experiment had not been made under favorable conditions. The vessel had landed during the unhealthful, rainy season. The landing and settlement had been made at a most undesirable location. Diseases had been contracted on the vessel during the voyage. Besides, there were many applicants who were not only ready but anxious to go. The decision was that they must continue the experiment.⁵⁵

Nothing daunted, therefore, by reports from the first expedition, the United States Government chartered the *Nautilus*, and she sailed from Norfolk early in 1821, and towards the latter part of March, the same year, the U. S. Schooner *Augusta* sailed. In the *Nautilus* went about thirty emigrants who, with a number of those who had been transported in the *Elizabeth*, were received into Sierra Leone. With these two expeditions went Messrs. Andrews, Winn, Bacon, Wittberger, and Mrs. Winn, agents for the Government and the Society. By the beginning of autumn, Andrews and Mr. and Mrs. Winn had died.⁵⁶

Late in 1821 Dr. Eli Ayres, as principal agent for the Society, arrived at Sierra Leone, and Captain R. F. Stockton arrived in the U. S. Schooner *Alligator*. December 11, Ayres and Stockton anchored off Cape Mesurado, or Montserado, and in exchange for gunpowder, tobacco, muskets, iron pots, beads, looking-glasses, pipes, cotton, etc., secured a title deed to a valuable tract of land which was the nucleus of what is now the Republic of Liberia.⁵⁷ It seems that the

⁵⁵ *Journal of Board of Managers of American Colonization Society, MS.*, October 16, 1820; *Origin, Constitution and Proceedings of American Colonization Society, MS.*, vol. i, pp. 131-149.

⁵⁶ Lugenbeel; *African Repository*, vol. i, pp. 3-4; *Origin, Constitution, and Proceedings of American Colonization Society, MS.*, vol. i, pp. 168-194.

⁵⁷ Lugenbeel.

land was never ceded either to the United States Government or to the Colonization Society. It was ceded to Captain Stockton and Dr. Ayres "to have and to hold the said premises for the use of these said [negroes] citizens of America."⁸⁸ The territory was a trust, and was from the first so considered by the Managers of the Society. From the first, they looked to the time when the colony they should plant would be able to stand alone, a model republic for the African to admire and, perhaps some day, imitate. Ayres then returned to Sierra Leone and prepared to plant the emigrants on the newly ceded territory. By April, 1822, this had been done.⁸⁹ At the beginning of summer Dr. Ayres left Africa for America, and put one of the colonists, Elijah Johnson, in charge of the settlement.

In August of this year, the brig Strong arrived from Baltimore with immigrants, a cargo of provisions, and Jehudi Ashmun, a name that must ever remain first in importance among the early white men who went to Africa to help establish the Society's colony. An indiscretion on the part of the colonists who had settled at Montserado, arising from a wrong interpretation of some of the acts of the native tribes, and the inability of the natives to appreciate fully their obligation to respect the deed of cession which they had made over to Dr. Ayres and Captain Stockton, caused hard feeling between the colonists and the natives. Ashmun saw at once that he must look for friction, and he lost no time in putting the settlement in a condition of military defence for the protection of the settlers who were then living at Montserado. Several attacks were made by the natives, but altogether without success. The defeated natives acquiesced in the occupation of the land they had ceded to the agents.⁹⁰ April 25, 1822, the American flag was for the first time hoisted on Cape Montserado.

By 1823 the Managers of the Society had become again

⁸⁸ Half-Century Memorial of American Colonization Society, 1867, p. 83.

⁸⁹ Lugenbeel.

⁹⁰ Ibid.

very hopeful of the success of colonization on the West Coast of Africa. They reported about a hundred and thirty settlers at that time living at the Society's settlement, a regularly planned town, and great improvement in the health of the colonists, although Mrs. Ashmun had died since her arrival in Africa. They noted a rapidly growing desire among the free negroes of America to emigrate to the settlement, and

when they reflect upon the frequency of manumissions, wherever the law has imposed no restrictions, when they consider the power of example . . . , and especially when they recollect the institutions of their country, and the light of the age, they are induced to expect that, should prosperity attend the colony, thousands now in servitude amongst us will one day be freemen in the land of their ancestors.⁶¹

Dr. Ayres, who had returned to Africa after his visit to the United States, was instructed to negotiate with the native kings for a "much larger extent of country than we now possess on that continent."⁶² An appeal went out from the Managers for more funds to meet the opportunities that were dawning upon the enterprise. They appealed for the means to send emigrants in sufficient numbers to render their presence along the coast a "security from the intrigues of slave traders," and to protect the settlements from the "cupidity of neighboring tribes." Also, "abundant information has been laid before the Board . . . to warrant the declaration that numerous slave holders would send, some a portion, and others the whole of their slaves to the colony, as soon as they are convinced that the colony is prepared for their reception, and that their condition would be improved by the removal."⁶³

In view of the often repeated charge made by the ultra-abolitionists that, between the African fever and the barbarity of the native tribes, the Society was sacrificing the

⁶¹ Origin, Constitution, and Proceedings of American Colonization Society, MS., vol. i, pp. 198-221, Sixth Annual Report of the Board of Managers, 1823.

⁶² Minutes of Board of Managers of American Colonization Society, MS., March 28, 1823.

⁶³ Ibid., June 4, 1823.

American free negro for its own selfish and unworthy aims, it will be not without interest to call attention to a report of the Managers, early in 1824. Since the origin of the Society, two hundred and twenty-five emigrants had sailed for the African coast. The number in the colony at the time of the report was one hundred and forty, a number of those missing having gone to Sierra Leone to live; several had returned to the United States, and only forty deaths had been reported. Of these forty, twenty-two were passengers on the *Elizabeth*. Only four deaths had resulted from conflicts with the natives; two had been drowned, one had died of old age, one died through his own rashness, and four were children under four years of age.⁶⁴ Indeed, the Managers thought this a very hopeful beginning, and others evidently agreed with them, for the Presbyterian Synods of Philadelphia and Virginia had approved the efforts of the Society, as had also the General Convention of the Protestant Episcopal Church, the first two, unanimously. And as for the possibility of securing emigrants, it was the opinion of the Board that "the means will never equal the demand for transportation."⁶⁵

The Managers, who had again memorialized Congress in 1822, urging further restrictive measures against the African slave trade,⁶⁶ adopted the recommendations of a committee appointed to consider the advisability of requesting further aid from Congress. The committee expressed the opinion that "it [the scheme of colonization] is well known to be far too great, to be sensibly affected by any resources which an association of individuals can command. To the nation, and to the nation alone, must we look for adequate means of accomplishing such a work." It was recommended that Congress be asked to take under its protection the colony already planted, to provide appropriations for its development, to make further purchases of territory, to

⁶⁴ Origin, Constitution, and Proceedings of American Colonization Society, MS., vol. i, pp. 231-232.

⁶⁵ *Ibid.*, vol. i, pp. 244-253.

⁶⁶ *Ibid.*, vol. i, p. 182.

supply it with a force adequate for its military defence, and to enact regulations for its temporary government. It was also recommended to petition Congress to incorporate the Society in the District of Columbia.⁶⁷ The petition that resulted went the way of all other petitions whose aim was to secure direct financial aid from Congress.

At the annual meeting in February, 1824, on the motion of General Robert G. Harper, the territory that had been secured was named Liberia, and the settlement made was named after the President of the United States, Monrovia. Early in this year a remonstrance from the Liberian settlements reached the officers of the Society. Although great care was taken to send out to the settlement only those who were believed to be desirable immigrants, the government of the Liberians by direction of the Society soon began to present added problems. Dissatisfaction among the few settlers had reached such a point that four documents and a special agent were sent to Liberia before the colonial agent was able to restore peace and order. The settlers complained, first, that lots had not been distributed to immigrants in accordance with instructions of the Board of Managers; second, that it was impracticable for settlers to obey the regulations requiring them to erect, each on his lot, a dwelling, within two years of his selection of the lot; third, that, because of the return of Dr. Ayres to the United States, the Managers evidently intended to abandon the settlers in a strange land; fourth, that certain settlers were being discriminated against, by the government, in favor of other settlers; and finally, that they were dissatisfied with the agents. The reply of the Managers is conclusive and sets forth beyond doubt the fact that the complaints were founded upon ignorance of the facts, although it is probably true that no adequate instructions and no definite and detailed scheme had ever been sent out to the agent for the government of the colony. Direct, and probably useful advice was given in the following words:

⁶⁷ *Ibid.*, vol. i, pp. 272-276.

Let us not be misunderstood. . . . It is our intention now and all times to distinguish between the industrious, the provident, the orderly and useful citizens—and those who are lazy, disorderly, and hurtful to the settlement. We wish it to be explicitly understood, that we will not extend . . . indulgence to the lazy and the disorderly. . . . It would give us great pleasure if we had the means to extend our supplies to those who would properly value and make good use of them. We have begged through the country—we have begged of Congress and of the State Legislatures—we are constantly begging and contributing ourselves. You receive all the benefit of it. Those who are not satisfied with this, will be satisfied with nothing.⁶⁸

During the disorders in the colony, the Society's agent was insulted and abused, public authority was defied, and an armed force had taken possession of, and robbed, the public storehouse, and the Managers, in an address to the Citizens of Liberia, say: "This is the very conduct repeatedly predicted by our opponents; we have been told over and over again that you would not submit to any law or government without an armed force; we have constantly repelled these reproaches on your character as unjust; what shall we now say?" The address was characterized by firmness, but also by kindness; and it was rather by an appeal to their reason than by threats of punishment that the Managers called upon the colonists to submit to rightful authority and settle their differences.⁶⁹ In their general instructions to the colonial agent, Mr. Ashmun, the Managers speak of the "wicked combination and disgraceful proceedings of Lot Carey and others. . . ." "Such proceedings, if repeated, must inevitably lead to the destruction of the Colony." The mildest punishment consistent with the reestablishment of order was to be inflicted; the arms were to be taken away from those who had had a part in the rioting; civil officers, among the offenders, were to have their commissions revoked. Carey, himself a minister, was to abstain from the further exercise of his ministerial function "till time and circumstances shall have evidenced the deepness and sincerity of his repentance."⁷⁰

⁶⁸ Minutes of Board of Managers of American Colonization Society, MS., March 20, 1824.

⁶⁹ Ibid., March 20, 1824.

⁷⁰ Ibid., vol. i, p. 201.

In private instructions, the agent was criticised for not having promptly resisted the first expression of "insolent and abusive language" toward him; and he was instructed: ". . . keep your arms by you, or near you. Never continue altercation, where there are symptoms of passion. . . . Stop the rations of every one who refuses to labour in the public service according to their oaths and engagements. If this will not do they must be banished." He was instructed to be as "mild, calm, steady, firm," as was consistent with the necessities of the case.⁷¹

In addition to these efforts to bring peace to Monrovia, the Managers sent out a special agent to examine and report on the prospects of the colony. The man selected was Rev. Ralph Randolph Gurley, a graduate of Yale and a native of Connecticut who, in 1822, began a connection with the central office of the American Colonization Society, where he gained a reputation as editor and orator that was not only coextensive with the limits of the Union, but that extended to England and Scotland. From 1822 to 1840 he did more than any other single man connected with the Society—and many men thought, as much as almost any half dozen men—to keep open the avenues of thought and sympathy and cooperation between the biggest and best of men in every part of the Union. Utterly unlike in their private practices, what Henry Clay was in the Halls of Congress, Gurley was to Colonization, essentially a peacemaker and a lover of the Union. Those who, following Garrison and his partisans, charge the colonization movement with being a move to rivet the chains of the slaves, and base their contention upon the fact that every President of the Society, from its organization to near the opening of the Civil War, was a holder of slaves, must be ignorant of the fact that Gurley's influence during those years of his active leadership was so much greater, in molding the policies of the Society, than that of any of these presidents, that it would be ridiculous to compare it with the influence of any, or all, of them.

⁷¹ Ibid., April 1, 1824.

Elliot Cresson, one of the most persistent Colonizationists in the history of the Society, used to call the second President, Charles Carroll of Carrollton, "The Great Incubus." Those who would understand the platform of the Colonization movement must consult, not the list of slaveholding presidents who were the official heads of the organization, although, with the possible exception of Carroll, not a president of the Society has ever been a proponent of slavery, notwithstanding the fact that the first four of them were holders of negro slaves (and the two phrases are by no means synonymous to those who realize that slavery was a problem), but the secretaries and the boards of managers and directors, for these were the molders of policy. During those years of bitter struggle, between 1830 and 1840, Gurley stands out as the great Colonizationist. He was the one man who held in the hollow of his hand the confidence of moderate men throughout the United States, on the subject of slavery. He was undoubtedly a poor guardian of the Society's exchequer. He wrought mightily with the pen and played havoc with the purse. But of all the charges that were made against him by extremists in England and America, not one has resulted in his conviction at the bar of public opinion. When he was superseded, a nation-wide protest, but a protest particularly from the South, went up. While Garrison was actively and consciously engaged in pulling the Union to pieces, Gurley was traveling from North to South, from East to West, observing the results of radicalism and dreading the aftermath. An accurate biography of Gurley would throw a new and not favorable light upon the results of Garrisonism.

This man was about to perform his first important service to the cause of Colonization. He met Ashmun at the Cape Verde Islands, whither the latter had been compelled to go, for rest and recuperation, and the two proceeded to Liberia. After ten days, Gurley left for America, leaving Ashmun commissions which, like his own, were from both the Government and the Society.⁷² When Gurley presented to the

⁷² Lugenbeel.

Managers his proposed constitution for the government of the colony, it was received with disappointment. "The Board think it much too complicated and intricate for the simplicity of a few settlers. . . . We wish the settlement founded in republican simplicity and Christian plainness—all unnecessary offices and dignities and official titles ought to be avoided."⁷³ But after six months' experiment, the instrument had proved so satisfactory that the Board withdrew its objection and officially approved it.⁷⁴ In his report to the Managers, Gurley expressed great satisfaction with the location of the settlement, the fertility of the soil, the health of the colonists, their general intelligence, their Sunday Schools. He was convinced, however, that the government was too feeble, and that several recent decisions of the Board had been received with dissatisfaction among the colonists. He noted the need for medicines, agricultural implements, etc.⁷⁵

The years 1825-1830 were years of rapid progress and expansion of the colonization scheme in the United States. The few settlers who began to return exerted an influence favorable to the spread of sentiment among the blacks in favor of emigration,⁷⁶ though some who returned opposed the colony. The opportunities of the Society, during this whole period, far exceeded its ability to take advantage of them. It was unable to afford the means of transportation for those who applied for passage. It did a great service in bringing about an interchange of views between leading men in the South Middle States and the New England States by sending such men as Charles Fenton Mercer and J. B. Harrison to meet with the legislature and to converse privately with leaders in New York and the New England

⁷³ Minutes of Board of Managers of American Colonization Society, MS., Nov. 13, 1824.

⁷⁴ Ibid., May 18, 1825.

⁷⁵ Origin, Constitution, and Proceedings of American Colonization Society, MS., vol. i, p. 277 ff.

⁷⁶ Minutes of Board of Managers of American Colonization Society, MS., Dec. 22, 1825.

States.⁷⁷ Memorials were presented to legislatures of the several States, asking their approbation of the objects of the Society and their pecuniary support.⁷⁸ The Society enlisted important workers when it adopted the suggestion of J. H. B. Latrobe, that the ladies of the Union be invited to organize female societies "for the purpose of aiding in the collection of funds by procuring donations, holding fairs, etc., etc.—that this be put into the form of a resolution, prefaced by some general remarks—'female sensibility—sympathy'—etc. etc. etc. and then published as a circular."⁷⁹ It also sought to make the means that it had count for most in the colony, by refusing to transport to Africa any free negro over fifty years of age, unless he was a member of a family that was emigrating to Liberia; and by refusing, except in extreme cases, to give more than six months' subsistence to colonists after their arrival at the settlement.⁷⁹

At the annual meeting in 1827, Henry Clay made an important speech, voicing the disappointment that was felt by the managers at the continued refusal of Congress to appropriate funds for the cause. He was sure that the Society had been organized merely as a pioneer in the work, and conscious of its inability to carry out its program without the support of Federal or State governments, or both. He realized that assistance had been denied it largely because it had been compelled to stand between two violent cross-fires of public criticism.

According to one (that rash class which, without a due estimate of the fatal consequence, would forthwith issue a decree of general, immediate, and indiscriminate emancipation) it was a scheme of the slaveholder to perpetuate slavery. The other, (that class which believes slavery a blessing, and which trembles with aspen sensibility at the appearance of the most distant and ideal danger to the tenure by which that description of property is held,) declared it a contrivance to let loose on society all the slaves of the country. . . .

He believed that, hereafter, the population of the United States would duplicate itself not oftener than once in every

⁷⁷ Ibid., May 10, 1825; Jan. 24, 1826.

⁷⁸ Ibid., Mar. 4, 1825; Sept. 24, 1827.

⁷⁹ Ibid., Jan. 12, 1829; Sept. 24, 1829.

thirty-three years. If, during the next period of duplication, he said, "the capital of the African stock could be kept down, or stationary, whilst that of European origin should be left to an unobstructed increase, the result, at the end of the term, would be most propitious," and at the end of two terms, would leave the proportion of black to white approximately one to twenty. Now, he thought it practicable to transport the annual increase of the whole colored population, slave and free, estimated by him to be about 52,000. The total expense of sending this increase to Africa, each year, would be \$1,040,000 and 65,000 tons of shipping. Is that, considering the magnitude of the object,

beyond the ability of this country? . . . If I could only be instrumental in ridding of this foul blot [slavery] that revered State that gave me birth, or that not less beloved State which kindly adopted me as her own, I would not exchange the proud satisfaction which I should enjoy, for the honor of all the triumphs ever decreed to the most successful conqueror.

Of the opponents of colonization he said:

If they succeed, they must go back to the era of our liberty and independence, and muzzle the cannon which thunders its annual joyous return. They must revive the slave trade with all its train of atrocities. . . . They must arrest the career of South American deliverance from thralldom. They must blow out the moral lights around us, and extinguish that greatest torch of all which America presents to a benighted world, pointing the way to their rights, their liberties, and their happiness. . . . Then, and not till then, . . . can you perpetuate slavery, and repress all sympathies and all humane and benevolent efforts among freemen, in behalf of the unhappy portion of our race who are doomed to bondage.

Of the future of the Society he says, "I boldly and confidently anticipate success."⁸⁰

The managers undoubtedly felt that, if the North was opposed to slavery, and if it regarded the presence of the free blacks as a source of weakness and of danger to the Union, and if the slaveholder was expected to offer his slaves their freedom, they ought to be able to hope confidently for liberal contributions from the Middle and New England States. But despite a rapidly growing sentiment favorable to the Society, despite active cooperation between

⁸⁰ *African Repository*, vol. ii, pp. 334-345.

the Secretary of the Navy and the Board of Managers, and despite the hopeful future that seemed to be opening upon Liberia, contributions from New England were distinctly disappointing.⁸¹ Expeditions had to be delayed or omitted and negroes who desired passage had to be refused, although the Society did not give up hope of providing necessary funds, until it had appealed for aid, not only through the ordinary channels, but through the churches, State Legislatures, and Masonic Orders.⁸² In 1829 the Managers publicly announced that the need for funds was "never so urgent as at present. Large drafts have come on us from the Colony, and it is all-important that our funds should be greatly increased, and that speedily."

If it be asked, why did not New England and why did not Congress grant to the Society the funds that it certainly needed, and without which it was unable to work most effectively, and the lack of which was the most important cause of the small number of emigrants transported to Liberia and a very important cause of the comparatively small number, not nearly so inconsiderable as is generally supposed, of slaves whose liberation it secured, the answer is not obvious. Perhaps the most satisfactory method of getting at the root of the matter will be to survey the progress of public sentiment, on the subject of colonization, from 1820 to 1830.

In 1818 the aims and efforts of the Society were approved by the General Assembly of the Presbyterian Church; also by the Society of Friends of Greensboro, North Carolina; by the Synod of Virginia; and by the General Association of Massachusetts.⁸³ Again in 1823, and again in 1826, the General Assembly of the Presbyterian Church reiterated its

⁸¹ Origin, Constitution, and Proceedings of American Colonization Society, MS., Annual Report, 1825; Minutes of Board of Managers of American Colonization Society, MS., vol. i, pp. 358, 359, 369, 383, 462, 466, 468, 483.

⁸² Minutes of Board of Managers of American Colonization Society, MS., vol. i, pp. 372, 374, 410, 428, 429, 430, 463, 504, 516, 561, 664, 665; African Repository, vol. v, p. 128.

⁸³ 27th Cong., 3d sess., H. Rept. no. 283, pp. 421-422, "Relating to African Colonization, etc.," MS.

approval of the work of the Society, as did the General Synod of the Dutch Reformed Church, and the Episcopal Convention of Virginia.⁸⁴ Before 1826 and again, between 1826 and 1830, the General Conference of the Methodist Church had approved the scheme; likewise, the Baptist General Convention.⁸⁵ In 1827 it was heartily endorsed by the Massachusetts and the Connecticut Conventions of Congregational Clergy, and by the Ohio Methodist District Conference.⁸⁶ But the talented and well known Samuel M. Worcester, college professor, senator, clergyman, and writer, called attention to a significant fact, in his correspondence with the Society:

There is another difficulty, which you will find opposing your efforts in this Commonwealth. It arises from the state of religious parties. The Orthodox and Unitarians seldom unite in the promotion of a benevolent object. Now it happens, that almost all our leading political men are Unitarians. It is not to be disguised that the influence of these men is wanted to give a State Society Auxiliary to the A. C. S. a certain kind of popularity. At the same time the orthodox are the people on whom you are to rely for efficient and permanent patronage. Whether the two parties can be brought to act in concert in regard to Colonization, is I think a hard question.⁸⁷

Prior to 1826 the legislatures of Virginia, Maryland, Tennessee, Ohio, New Jersey, Connecticut, Rhode Island and Indiana had officially approved the colonization project as carried on by the Society.⁸⁸ In 1827 Vermont and Kentucky expressed themselves, through their legislatures, favorable to the Society, as did Ohio, and Kentucky again, in 1828; Pennsylvania and Indiana, in 1829; Massachusetts, in 1831; and New York and Maryland, in 1832. The Delaware Legislature likewise gave its approval.⁸⁹ The reso-

⁸⁴ *African Repository*, vol. i, p. 125; *Minutes of Board of Managers of American Colonization Society*, MS., June 2, 1823; 27th Cong., 3d sess., H. Rept. no. 283, pp. 421-422.

⁸⁵ *African Repository*, vol. i, pp. 343-344; *Letters of American Colonization Society*, MS., Martin Ruter to Gurley, Cincinnati, Ohio, June 27, 1828.

⁸⁶ *African Repository*, vol. iii, pp. 118-120.

⁸⁷ *Letters of American Colonization Society*, MS., Worcester, Amherst College, Nov. 16, 1829.

⁸⁸ *African Repository*, vol. i, pp. 343-344.

⁸⁹ 27th Cong., 3d sess., H. Rept. no. 283, pp. 926-936.

lution of the Massachusetts Legislature was in the following words: "That the Legislature of Massachusetts view with great interest the efforts made by the American Colonization Society in establishing an asylum on the Coast of Africa for the free people of color of the United States; and that, in the opinion of this Legislature, it is a subject eminently deserving the attention and aid of Congress, so far as shall be consistent with the powers of Congress, the rights of the several States of the Union, and the rights of the individuals who are the objects of those efforts." The Pennsylvania Legislature declared, "Their removal [that of the free people of color] from among us would not only be beneficial to them, but highly auspicious to the best interests of our country." The Indiana Legislature expressed "unqualified approbation."

As to public sentiment in the Middle and New England States, David Hale, of the New York Journal of Commerce, said: "So far as I have been able to understand public sentiment here, it is entirely (among evangelical Christians at least) in favor of the Society, and its objects are believed to be attainable. The principal thing to be established, I think, is a firm conviction that the affairs of the Society are always judiciously managed. It has been thought that there was in some instances a want of system and order."⁹⁰ One of the Society's agents in Vermont reported: "There is a very general impression in these States that we are coming up to the work about as fast as could be expected and that the Southern States are not doing their part."⁹¹ Theodore Frelinghuysen wrote, of New Jersey: "Public feeling is against us—it regards the scheme as visionary—and nothing but an experiment conducted upon decided and liberal principles will correct the views of the great majority of our citizens."⁹² Jared Sparks said: "The cause is one of great importance, and cannot be supported with too much zeal or force."⁹³ The editor of the Vermont Chronicle thought:

⁹⁰ Letters of American Colonization Society, MS., Sept. 7, 1826.

⁹¹ Ibid., Myron Tracy to Gurley, Hartford, Conn., October 3, 1826.

⁹² Ibid., Frelinghuysen, Newark, N. J., Feb. 3, 1827.

⁹³ Ibid., Sparks to Gurley, 1827.

"There is not, we believe, another benevolent enterprise on earth, so well calculated to secure the favorable opinion and enlist the hearty good will of all men, as is this, when its objects and bearings are fully understood."⁹⁴ The Connecticut society reported, in 1829: "Only one opinion is expressed among our citizens, and that opinion is unqualified approbation."⁹⁵

From the South, particularly the lower South, reports were not so favorable. A South Carolinian wrote in 1827: "I am truly sorry I cannot procure more friends and aid to the Society. I am however determined to persevere, under the belief that opposition will give way to information. This however is the great difficulty. The press, in the State, is mostly against the Society. Things in its favor are uniformly excluded and things against it are spread abroad."⁹⁶ Rev. William Winans, a prominent Mississippi Methodist preacher and an agent of the Society, wrote: "I am persuaded that the efforts of an agent would be of vast importance: but the selection must be judicious."⁹⁷ Clergymen from South Carolina and Georgia reported much hostility to the Society in those States.⁹⁸

Of sentiment in Ohio, one of the general agents of the Society, whose territory included that State, reported very favorably.⁹⁹ Another agent, reporting from the same State, said:

Among the members, we number the Governor, Auditor and Treasurer of the State, Speaker of the Senate, a considerable number of Senators and Representatives, respectable and influential citizens. But sir, though the attempt will doubtless be triumphant, I frankly confess, that I have met strong opposition, resulting from ignorance of the nature and design of the A. C. Soc. The great, popular objection is, that it is a scheme of slaveholders, to strengthen the bonds of slavery, by the removal of the free blacks. You may say that I have the means, at once of refuting these ungenerous slan-

⁹⁴ African Repository, vol. iv, p. 142.

⁹⁵ Ibid., vol. v, p. 121.

⁹⁶ Letters of American Colonization Society, MS., H. McMellan, of South Carolina, Feb. 23, 1827.

⁹⁷ Ibid., Winans, Centreville, Miss., Feb. 27, 1827.

⁹⁸ Letters of American Colonization Society, MS., Canton, Ohio, B. O. Peers to Gurley, Nov. 1, 1826.

ders; but, sir, this is hard to accomplish, however ample the means, when men will neither hear nor read and are pertinaciously wedded to their errors. The cause however, gains ground very obviously and will achieve a general conquest. It is the cause of justice, of humanity, of God, and shall prevail.¹⁰⁰

Few men in Virginia were more competent than W. M. Atkinson, of Petersburg, to give an accurate report of sentiment in that State. In 1827 he was greatly discouraged, for the success of the Society in its operations in the South. He said:

To see a people to whom I am thus closely bound by ties of affection, differing from me, on any question so important and so interesting as this, would of itself be painful. But there is another and a more legitimate source of painful feeling. One of the strongest recommendations of the Colon. Soc. in my eyes, has always been the *indirect* but powerful influence which I thought it would exert on the very existence of that fell destroyer of the prosperity and the morals, of our land, slavery. I hoped it would do this by keeping the public mind fixed on the subject, and by showing the practicability of removing the unhappy race . . . to the land of their fathers, whilst it carefully avoided touching those points, which could not even be discussed without awakening the most unkind and bitter feelings. Hence I regarded every friend gained by the Society in the larger slaveholding States as equal to two friends in any other region. . . . Now I have seen with deep regret that the enemies of the Society in this part of Virginia, (and I fear it is the case throughout the Southeastern States,) are increasing in number and violence. . . . Do you desire to know the cause? So far as I can judge, (and I have used all the means in my power to learn the true reason,) it is the application *made last winter and it is supposed to be renewed next winter, to Congress for aid*. The people of this region, at least an overwhelming majority of them, believe that Congress have no power to grant that aid. I will not stop to ask whether their opinions are right or wrong. . . . It is sufficient that they do hold these opinions—and furthermore, if upon any topic they would watch with double jealousy the movements of Congress, it is upon such as are in the most distant manner connected with our black population. . . . I feel constrained to express the opinion that if the Managers and the Society do persevere in making their application to Congress they do it at the cost of alienating almost all their friends in the Southern Atlantic States. Hence they must lose not only whatever pecuniary aid they have expected from this quarter, but they must abandon forever the hope, of operating on the public mind in the manner above hinted, so as ultimately to exert a powerful influence on the total voluntary abolition of slavery.¹⁰¹

Yet General John H. Cocke, a prominent figure in the colonization cause, wrote more hopefully of Virginia. He

¹⁰⁰ Ibid., Rev. M. Henkle, Columbus, Ohio, Jan. 4, 1827.

¹⁰¹ Ibid., Atkinson to Gurley, Petersburg, Va., July 4, 1827.

thought the cause was gaining ground, although he thought that political agitation had done it injury in certain parts of the State.¹⁰²

The fact is that it was a very difficult matter to keep the colonization movement entirely distinct from the discussions during political campaigns. This was true, not because Colonization leaders sought to work through the channels of political parties, but because Colonization was too meaty a bone, over which political aspirants could harangue, to be entirely ignored. In January, 1827, Latrobe wrote:

Clay I see has been helping himself to a ride on our shoulders—but as he has no doubt been of service to us, I will not scrutinize too closely into his motives. . . . Weems [a Maryland Congressman, who insisted on favoring Colonization, in spite of his unpopularity and his inability to ride like a Clay] is an ass, aye, a very ass.¹⁰³

Of the public men of Virginia who, in 1827, opposed the Society, William B. Giles stands out prominently. William Maxwell, prominent in Virginia as college president, legislator, and Colonizationist, wrote:

I cannot tell you what you are to think of our Virginia Assembly, for I really don't know what to think of them myself. They certainly seem to hang back most shabbily in this great business of our Society. But the truth is, I suppose, they are many of them still wofully ignorant of the whole nature and progress of our engagement, and I have had some proof of it that would amuse and amaze and distress you all together.

But he thinks that at the next session of the legislature:

We shall be able to obtain an act that will please you—Governor Giles notwithstanding.

I should have liked hugely to have taken this political mountebank in hand, as you wish me to do; but have been restrained from meddling with him for two or three weighty reasons. In the first place his [policies] are such tissues of nonsense and paganism that they can do no harm, I think, except with incurables. 2ly, he is such a prince of hoaxers, and has such power of misleading the simple, and all who are willing enough to be duped by him, that I do not think it would be good policy to irritate [him into] more active hostility against our scheme if we can help it. . . . and lastly, I am more and more satisfied that it is our duty to pursue this great subject with the tone and spirit of the gospel in meekness instruct-

¹⁰² Ibid., Cocke to Gurley, Fluvanna County, Va., July 7, 1827.

¹⁰³ Ibid., Latrobe to Gurley, Baltimore, Jan. 27, 1827.

ing them that oppose themselves if peradventure God will give them grace to the acknowledging of the truth. So I shall let him alone, for the present at least—and especially since he is become (by a fantastic revolution of the wheel of fortune) our Governor elect!—for which I am most heartily sorry of course.¹⁰⁴

William M. Blackford, the most important Colonizationist living in Fredericksburg, Virginia, wrote, in 1828:

I cannot forbear congratulating you on the active hostility to our scheme of the miserable wretch now at the head of affairs in Virginia. The suicidal infelicity of his arguments is never dangerous to any cause but the one he supports. I know of several who have become friends simply because Giles is an enemy. Any scheme of benevolence within the level of his comprehension or approbation, would be received with suspicion—and *e converso* his denunciation received as highest praise and commendation.

I have reason to believe that a great change is about to take place in Virginia—she will I have no doubt become decidedly the advocate of colonization. The coming year (in which the question of convention will be settled) is big with her fate.

I cannot omit to state, as an evidence of the progress of our cause, that the announcement of our intention to have a public address excited no other feeling than that of approbation, whereas, had anyone attempted some 8 or 10 years ago to make a speech on the subject, he would in all probability have been mobbed.¹⁰⁵

It was significant that the legislature refused to consider resolutions hostile to the Society, submitted by the Giles party.¹⁰⁶

During the years 1827–1829, the Society was viewed, at least in some of the Northern and Western States, as a part of the Clay machine. Clay had supported it so consistently that it was brought into every contest in which he was a leading character. And even today, his support of it will be by many considered a support purely for party purposes. And yet Clay's support of colonization was the logical outcome of his whole political course, and any other position would have been inconsistent with the public policy of the man.

If now it be asked again, why did not Congress appropriate funds to carry on the work of the Society, the answer may be somewhat simplified by this discussion of the state

¹⁰⁴ Ibid., Wm. Maxwell to American Colonization Society, MS., Norfolk, Va., Feb. 24, 1827.

¹⁰⁵ Ibid., Blackford to Gurley, Feb. 26, 1828.

¹⁰⁶ Ibid., D. J. Burr, Richmond, Va., to Gurley, March 10, 1828.

of public opinion in the different sections of the Union. The congressmen from South Carolina and Georgia would not support such an appropriation because South Carolina and Georgia were wedded to the system of slavery, and looked upon the Society as a form of New England abolitionism.¹⁰⁷ The hostility was made all the more pronounced by the fact that the political acrobats made capital of the opposition and used it as a favorite issue. They associated it, in their campaigns, with the tariff and internal improvements. Charles Coatesworth Pinckney who, ten years before, had been one of the most liberal contributors in Charleston to the Society, was now in 1830 calling the scheme both cruel and absurd. The editor of the official journal of the Society sized up the situation in these two Southern States as follows:

Voluntary emancipation begins to follow in the train of Colonization, and the advocates of perpetual slavery are indignant at witnessing in effectual operation, a scheme which permits better men than themselves to exercise without restraint the purest and the noblest feelings of our nature.¹⁰⁸

The opposition in Virginia, and doubtless in North Carolina, was not from the enemies, but from the friends of colonization. Even William H. Fitzhugh had declared that, firm as he was in his advocacy of the colonization scheme, and favorable as he was to asking for an appropriation for it from Congress, he would actively oppose such an appropriation if he thought it was not in keeping with the spirit of the Constitution to grant it. It was undoubtedly the belief in Virginia and, at least to a considerable extent, in North Carolina, that such an appropriation was not warranted by that instrument. The view of Atkinson, a leader in the colonization movement in Virginia, has already been set forth. Rev. John Cooke of Hanover County, Virginia,

¹⁰⁷ Ibid., Rev. Wm. Meade, Feb. 21, 1827; S. K. Talmage to Gurley, Augusta, Ga., May 29, 1829; Rev. B. M. Palmer, Charleston, S. C., Aug. 4, 1830; *African Repository*, vol. i, pp. 161-164, 180-191; vol. ii, pp. 22-23; vol. iii, p. 172 ff.; vol. ix, pp. 228-229; vol. vi, p. 193 ff.; Minutes of Board of Managers of American Colonization Society, Apr. 25, 1831.

¹⁰⁸ *African Repository*, vol. vi, pp. 193-209.

had been requested to distribute memorials praying for aid for the Society from Congress. His reply was: "Even those who have reflected on the subject and are favorably disposed towards it, are generally opposed to Congress interfering. I am rather afraid that, with their present limited knowledge of the subject, their many mistaken views of it, and the morbid state of feeling that exists about here respecting the assumptions and implied powers of the General Government, it will be dangerous to offer the memorial for signatures."¹⁰⁹

Probably the most powerful, or at least the most influential, argument that was made against federal appropriation in aid of the Society, was that contained in a report, presented by Senator L. W. Tazewell, of Virginia, in reply to many memorials asking that the Society receive federal aid. The burden of the argument was the unconstitutionality of appropriating federal revenue for the purposes proposed; the unconstitutionality of holding as a dependency a colony that, from its very position, could never become an integral part of the American system and that, therefore, was not contemplated by the fathers of the Constitution; the danger involved in any effort, on the part of the Federal Government "to intrude itself within the limits of the States, for the purpose of withdrawing from them, an important portion of their population"; and the probability that such a move would soon result in the Federal Government being called upon by the States to pay "something like an equivalent for the slaves, in order to obtain their manumission."¹¹⁰

Nor were these constitutional scruples confined to those who lived in Virginia. Gerrit Smith himself doubted the power of the Federal Government to make appropriations for this purpose.¹¹¹ And he said of the Van Buren men in the New York Legislature, that they were as full of consti-

¹⁰⁹ Letters of American Colonization Society, MS., Rev. John Cooke, Hanover County, Va., Feb. 9, 1827.

¹¹⁰ African Repository, vol. iii, pp. 161-172.

¹¹¹ Letters of American Colonization Society, MS., G. Smith, Jan. 5, 1830.

tutional scruples as the South Carolinians were.¹¹² When, in 1835, Clay made another attempt in the Senate, Maxwell thought that if the Virginia Legislature failed to take action favorable to the Society, it would be because of the effort made in the federal body.¹¹³ An agent of the Society wrote in 1837:

I have just come from Mr. Ritchie's office, where I found him engaged in writing an article, calculated to do away in a great degree the good effect of what he has said before; and all drawn forth by the discussion in Congress. . . . It is a matter of universal regret among our friends here that Mr. Clay moved the subject in Congress.¹¹⁴

Among those Virginia colonizationists who did not agree with their colonization brethren of the strict construction school were John Marshall and James Madison. On this point they were both prepared to admit the power of the Federal Government to offer aid, it seems. But they thought the most unobjectionable scheme, and the one most likely to overcome popular prejudice, was that proposed by Rufus King in the United States Senate, February 18, 1825:

That, as the portion of the existing funded debt of the United States, for the payment of which the public land of the United States is pledged, shall have been paid off, then and thenceforth, the whole of the public land of the United States, with the net proceeds of all future sales thereof, shall constitute and form a fund, which is hereby appropriated, and the faith of the United States is hereby pledged, that the said fund shall be inviolably applied to aid the emancipation of such slaves, within any of the United States, and to aid the removal of such slaves, and the removal of such free persons of color, in any of the said States, as by the laws of the States respectively may be allowed to be emancipated, or removed, to any territory or country without the limits of the United States of America.

Of this plan Marshall said:

It is undoubtedly of great importance to retain the countenance and protection of the general government. . . . The power of the government to afford this aid is not, I believe, contested. I regret that its power to grant pecuniary aid is not equally free from question. On this subject I have thought and still think that the proposition made by Mr. King in the Senate is the most unexceptionable and the most effective that can be devised.¹¹⁵

¹¹² Ibid., Smith to Gurley, April 16, 1832.

¹¹³ Ibid., Rev. C. W. Andrews to Gurley, Richmond, Feb. 1, 1836.

¹¹⁴ Ibid., Rev. C. W. Andrews, Richmond, Feb. 1, 1837.

¹¹⁵ Ibid., Marshall to Gurley, Richmond, Va., December 13, 1831.

Mr. Madison favored, likewise, the plan of Mr. King. "I am aware," he said, "of the constitutional obstacle which has presented itself; but if the general will be reconciled to an application of the territorial fund to the removal of the colored population, a grant to Congress of the necessary authority, would be carried with little delay through the forms of the constitution."¹¹⁶

The active and open opposition of the States of the South-east, the constitutional objections that prevailed in other of the Southern States, and in some of the Middle States, and the various local opinions that predominated in portions of New England and the Western States, such objections, for instance, as the doubt of the practicability of the scheme; the belief that pervaded many localities that the Society's chief purpose was to increase the value of slaves; and the feeling, now becoming deeply rooted, that the remedy for slavery was immediate emancipation rather than settlement on the coast of Africa—these causes are sufficient to explain why the Society was unable to secure from Congress direct appropriations in aid of colonization.

And so the Society was forced to depend, at the time of its greatest promise, upon the contributions voluntarily sent in. The amount contributed from the year 1820 to the end of 1830 was \$112,842.89. The amount of the expenditures during the same period was \$106,367.72. The number of emigrants transported to Liberia was 1430. The total cost, per emigrant, including in this amount not only the transportation and subsistence expenses, but also salaries paid to officers of the Society both in the United States and Liberia, the support of public schools, buildings, presents to native kings, fortifications, expenses of court house and jail in the colony, expenses of opening roads, and founding settlements, was \$74.38.¹¹⁷ In spite of the criticism of the Abolitionists that the public was being imposed upon by men who used too large a part of the contributions in the payment of

¹¹⁶ African Repository, vol. xiv, pp. 305-306.

¹¹⁷ Minutes of Board of Managers of American Colonization Society, MS., Feb. 20, 1834.

office salaries, it is difficult to see how so much could have been done with the expenditure of so limited an amount.

The expeditions of emigrants between 1820 and the end of 1830 are as follows, with number of emigrants, by States:¹¹⁸

Year.	Vessel.	Va.	N.C.	S.C.	Ga.	Md.	D.C.	N.Y.	R.I.	Tenn.	Miss.	Pa.	Total.
1820	Elizabeth	9				2	2	41				32	86
1821	Nautilus	24				8							32
1822	Strong					26						10	36
1823	Oswego	17				24						19	60
1824	Cyrus	103											103
"	Fidelity					4						1	5
1825	Hunter	48	17				1						66
1826	Vine								32				33 ^a
"	Indian Chief	18	118			12							148
1827	Doris	8	74			10							92
"	"	22				65		15					104 ^b
"	Randolph			26									26
1828	Nautilus	7	145			12							164
1829	Harriet	132	1			17							150
1830	Liberia	45	1							10		1	58 ^c
"	Montgomery	30	2		30	7	1						70
"	Carolinian	78	1		9	9		1			8		106
"	Valador	39	41										81 ^d
Totals.	18	580	400	26	39	196	4	57	32	10	8	63	1,420

^a One also from Massachusetts.

^b Two from Delaware.

^c One from Connecticut.

^d One from Alabama.

Prior to 1827 the emigrants transported were nearly all free negroes; after that time, many of them were recently emancipated slaves and, in very many cases, slaves who had been emancipated or manumitted for the express purpose of removal and who would not have been given their liberty had it not been for the Colonization Society.¹¹⁹

If the Society had had the financial support of the federal

¹¹⁸ African Repository, vol. x, p. 292. It will be noted that the total number of emigrants here given is 1420, whereas the number reported by the Board is 1430. The cause of the discrepancy is not apparent.

¹¹⁹ Lugenbeel.

government, there is no doubt that its operations would have been greatly enlarged and that the number of slaves liberated would have reached far into the thousands. At this time, as at every other time, up to the proclamation of emancipation, the active directors of the Society, the agents, the colonial agents and governors, and the active members in every part of the Union were opponents of slavery, and looked forward, some of them, to its comparatively speedy, and by far the larger number of them, to its ultimate, abolition. Fearing the increase of the free negro population, the legislatures had passed laws restricting very materially the right to emancipate slaves. Indeed, emancipation, without the removal from the State of those emancipated, was made a violation of the law. And yet, the emancipations went on in the Southern tier of the Middle Atlantic States, and there is no telling how far it would have gone had the Society's efforts not been circumscribed by the limitation of its resources. Monroe told Elliott Cresson that he believed the Society could secure the emancipation of ten thousand slaves in the single State of Virginia if it would send them to Liberia. Undoubtedly the Society was favorably known in every part of the Union in 1829, although its friends were comparatively few in Georgia and South Carolina.

It was just at this hour of triumph and of promise that there arose, in the North and West, the most virulent, need-less, and unscrupulous opposition the Society was ever called on to face. And this was but one of several causes of the difficulties it had to encounter between 1831 and 1839. The Abolition offensive, the secession of auxiliary societies, financial difficulties, distress in the colony, and a reorganization of the Society—these are the topics of real importance that ought to be discussed, in a study of its operations.

Opposition from the Garrisonians was like a bolt from the blue. Garrison himself began life a friend of the Society. Arthur Tappan, James G. Birney, who was for months one of its active agents, Gerrit Smith, who gave thousands of dollars to the Society before the time of his

defection—all these were Colonizationists before they were Abolitionists. Garrison had addressed a Boston audience in a speech favoring colonization; it was while he was working for the Society, not after he went over to the Garrisonians, that Birney decided to give up his slaves; Gerrit Smith, up to 1835, thought that the Society was not only not pro-slavery, but that it stressed emancipation too consistently to retain the active cooperation of the South. And when these men ceased to be Colonizationists, they did so, not because they had discovered some ulterior and hidden, or dishonorable motive. The swan songs of Birney and Smith, each requiring a considerable part of the issue of the *Liberator* in which it appeared, were very frank disavowals of the discovery of such motives. The opprobrium and the charges were evolutions, largely of Garrison's mind. The General Assembly of the Presbyterian Church in 1830, with but four dissenting votes recommended the taking of Fourth of July collections for the objects of the Society.¹²⁰ John A. Dix of New York wrote, in the same year: "The current of opinion is with the Institution; and it will be borne on to the fulfilment of its object."¹²¹ Thomas Clarkson, of England, wrote:

For myself I am free to confess, that of all the things that have been going on in our favor since 1787, when the abolition of the slave trade was first seriously proposed; that which is now going on in the United States is the most important. It surpasses everything which has yet occurred. No sooner had your Colony been established on Cape Mesurado, than there appeared to be a disposition among the owners of slaves in the U. S. to give them freedom voluntarily without compensation and to allow them to be sent to the land of their ancestors. To me this is truly astonishing.¹²²

Wilberforce wrote: "You have gladdened my heart by convincing me, that sanguine as had been my hopes of the happy effects to be produced by your Institution, all my anticipations are scanty and cold compared with the reality."¹²³

¹²⁰ *African Repository*, vol. vi, p. 91.

¹²¹ *Ibid.*, vol. vi, pp. 163-169.

¹²² Letters of American Colonization Society, MS., London, Oct. 6, 1831. E. Cresson to Gurley.

¹²³ *Ibid.*, Cresson to Gurley, Nov. 29, 1831.

The whole State of Virginia was deeply stirred by the Southampton Insurrection, as was also at least one neighboring State, Maryland, and the cause was greatly revived.¹²⁴ In the midst of Garrison's tirades, George Bancroft and Governor Levi Lincoln, of Massachusetts, were both friends of the Society.¹²⁵ An agent of the Society, traveling by a circuitous route from New York to Maine, had conversed with editors, clergymen, and others acquainted with public sentiment. He reported that he had talked with from ninety to one hundred editors. Of these, only four expressed hostility to the Society, one of the four being the editor of the *Liberator*. More than nine-tenths of these editors expressed friendly feeling towards the Society. He had talked with more than three hundred clergymen, only three of whom expressed hostility to it. He quoted very favorable resolutions passed by the Methodist District Conference of Penobscot District, of the Baptist Convention of Maine, and of the Baptist Convention of Massachusetts.¹²⁶ R. H. Toler, editor of the *Lynchburg Virginian*, wrote: "Among the people of this section of country, there is very little opposition felt or manifested to the scheme of African Colonization. Men, of all creeds in politics and of all sects in religion, cooperate in advancing its interests."¹²⁷ Of the Valley of Virginia, William C. Matthews wrote: "As far as I know, throughout all this valley, there is an almost universal feeling in favor of your American Colonization Society."¹²⁸

And yet Gurley, the Society's secretary, writing from Richmond, Virginia, where he had gone during the meeting of the legislature, wrote to a member of the Board of

¹²⁴ *Ibid.*, Atkinson to Gurley, Petersburg, Va., Sept. 10, 1831; Benjamin Brand to Gurley, Richmond, Va., Oct. 5, 1831; Brand to Gurley, Richmond, Va., Oct. 8, 1831; Gen. John H. Cocke, Sr., to Gurley, Steamboat on Chester River, Oct. 7, 1831; D. J. Burr, Richmond, Va., Oct. 17, 1831; Wm. Maxwell, Nov. 30, 1831.

¹²⁵ *African Repository*, vol. ix, p. 24.

¹²⁶ *Letters of American Colonization Society*, MS., Wm. L. Stone, N. Y., Apr. 19, 1833.

¹²⁷ *Ibid.*, Toler to Gurley, Lynchburg, Va., Aug. 22, 1833.

¹²⁸ *Ibid.*, W. C. Matthews, Martinsburg, Va., Aug. 13, 1833.

Managers of the Society: "We can account for the course of the Legislature only by supposing either that *professions* of regard for colonization have been insincere—that abolitionism has alienated the members from colonization—or that they have changed their principles and go for perpetual slavery—something may be owing to each of these supposed facts."¹²⁹ To him who is tolerably acquainted with Virginia history, the statement of Toler and that of Gurley are full of significance. An extract from a letter of William H. Fitzhugh to the Society in 1829 will throw much light on these statements. Fitzhugh was at that time a member of the Virginia legislature.

We have no chance to do anything for the Col. Soc. this winter, nor indeed ever again, till our representation [the representation of Eastern and Western Virginia, in the Legislature] is equalized. The present is the ablest legislature I have ever seen assembled here; and it is also completely drilled for party purposes. On the subject of the Col. Soc. we can carry with us the representatives of a majority of the people; but the lower country, by its excess of representation, can control all our movements. We have just concluded one of the most protracted as well as able debates I have ever heard, on the subject of South Carolina opposition to the tariff . . . one of the majority acknowledged, in debate, his belief that these were the last resolutions in favor of State rights that would ever be passed. My own opinion is that the effect of the convention will be to revolutionize the politics of Virginia entirely—"a consummation most devoutly to be wished."¹³⁰

From these statements and from very many others that might be added, it is evident that the legislature of Virginia did not represent the public opinion of the entire State, but only of the Eastern section of the State. If, as the Abolitionists were just at this time charging, the Colonization Society was an invention of slaveholders and, of course primarily Virginia slaveholders, to increase the value of their slaves, eastern Virginia sentiment would have been more favorable than western Virginia sentiment towards the Colonization Society. Western Virginia was certainly in no mood to be foremost in favoring an organization gotten up by the slave owners of the eastern counties

¹²⁹ Ibid., Gurley to Joseph Gales, Richmond, Va., March 16, 1837.

¹³⁰ Ibid., Fitzhugh to Gurley, Richmond, Feb. 22, 1829.

for their own pecuniary profit. The opposition between these two sections was active and the hostility acute,¹⁸¹ and particularly in the attitude each took towards the question of slavery. The fact that it was the legislature that held back and the western part of the State that urged support of the Society, is very important evidence that Garrison's accusations were baseless.

In the West Clay, of Kentucky, and Elisha Whittlesey, were probably the most influential of all the Colonizationists. In the Southwest, there was zealous support of the Society. Hundreds of slaves were given over to it for transportation to the Colony. The Presbytery of Mississippi, in 1833, passed resolutions expressing "unabated confidence in the principles and plans of the American Colonization Society . . . and once more recommend it cordially to their congregations."¹⁸² But in South Carolina and Georgia, opposition was still pronounced.¹⁸³ Y. S. Grimke wrote from Charleston: "Let me advise for your sakes and for the sake of the Union, that until this crisis be past you do not send an agent at all, not even to explain your views to the colored people,—so as to encourage them to emigrate."

It was just at this time, when sentiment was very favorable to the Colonization scheme, and when the charges made by Garrison and his coadjutors were utterly out of place and uncalled for, that the storm of that radical leader broke upon the Society. An account of that opposition will receive more attention hereafter. It is enough, here, to say that Secretary Gurley, writing from New York in 1834 declared: "The Abolitionists are certainly gaining ground, and will carry a large portion of the North with them unless we can find agents of zeal and talent to defend the cause in this part of the country."¹⁸⁴ In 1835 he thought there were

¹⁸¹ C. H. Ambler, *Sectionalism in Virginia*, *passim*.

¹⁸² Letters of American Colonization Society, MS., Pine Grove, Miss., Feb. 23, 1834.

¹⁸³ *Ibid.*, J. Corning to Gurley, Charleston, S. C., Feb. 10, 1831; Grimke to Gurley, Charleston, S. C., May 17, 1831; *African Repository*, vol. xiii, pp. 201-206.

¹⁸⁴ Letters of American Colonization Society, MS., Gurley to Gales, N. Y., Apr. 8, 1834.

nearly a dozen weekly newspapers, besides many other periodicals, "in great part devoted to the work of destroying the influence of this Society."¹⁸⁵ And the influence that resulted from the Abolition crusade was great and immediate, as will appear from a letter from the New England philanthropist, Thomas H. Gallaudet: "But *in confidence*, I must tell you, that the Col. cause must recede in its influence in New England, unless it is made to operate, (and *avowedly so* by those who advocate it here), as one of the means for the abolition of slavery."¹⁸⁶ At a later time the Society regained some of the ground it had lost in New England; but for approximately ten years it was almost impotent in that section.

Another difficulty was the secession of auxiliary societies. During the decade from 1830 to 1840, the Maryland, Pennsylvania, New York, Mississippi, and Louisiana societies adopted policies either partially or entirely independent of the parent organization. The Maryland Society was the first to assume an independent course, and its independence was practically complete. It established a settlement of its own at Cape Palmas, miles south of the older settlements; the Pennsylvania and New York societies established a settlement at Bassa Cove, between Monrovia and Cape Palmas; the Mississippi and Louisiana societies established a settlement at Sinou. Eventually all these societies were restored to their auxiliary relation; but during the period of their independent action they were a source of weakness to the parent Society. With all their good wishes at the parting, they invariably competed with the activities of the older organization. Not only so; but they almost nullified the efforts of the Society to raise funds in territory over which they claimed jurisdiction. They also sent out their own expeditions and controlled their own policies, which sometimes fell short of the requirements of wisdom.

For instance, the Pennsylvania society, mindful of the

¹⁸⁵ Ibid., Gurley, Washington, D. C., Mar. 23, 1835.

¹⁸⁶ Ibid., Gallaudet to Gurley, Hartford, Conn., July 5, 1838.

origin of the Keystone colony, established a settlement on peace principles, forbidding the possession or use of arms therein. The result was that the Africans made an attack which proved so disastrous that the surviving settlers had to be taken to a protected settlement. Furthermore, so long as the parent Society was able to hold together the auxiliaries, it was able to unify the aims and feelings of organizations widely separated, in distance and also in the environment of opinion in which they lived. Numerous societies under a common head would entertain, in general, a common opinion and have common aims. Hardly had the Maryland Society seceded before its policy began to differ from that of the American Colonization Society. And after the withdrawal, for many, though not all, purposes, of the Pennsylvania and New York Societies, they immediately began to approximate more and more closely the moderate Abolitionists of the North. Separate action on the part of these organizations was a severe blow to the parent society, and for years a large part of its energy was directed to the restoration of auxiliary relations.

The movement for separate action, on the part of the Maryland Society began, it seems, early in 1831. Various causes have been given for the action that was then taken. Elliot Cresson, whose zeal for Colonization was equaled only by his exaggerated views of the business inefficiency of the Board of Managers of the parent Society, declared that the reason back of Maryland's defection was her distrust of the Board's ability to handle properly the funds—not the dishonesty but the business incompetency of it.¹⁸⁷ And it is certainly true that after repeated meetings in an attempt to adjust satisfactorily the differences that had arisen, for the Board of Managers saw in Maryland's action the setting of a precedent that was likely to rise to plague them, the point upon which negotiations were finally broken off was in the discussion upon the disposition of funds re-

¹⁸⁷ *Ibid.*, Cresson, Philadelphia, Pa., Apr. 12, 1831.

ceived into the Maryland treasury.¹³⁸ The position of the Maryland Society was stated by J. H. B. Latrobe: "We agree to make regular returns of our receipts and expenditures to you and to bear the expences of our colonists in Africa; but not a voice was heard in favor of paying or placing to your credit one penny of our funds gross or surplus."¹³⁹ By a committee of the Maryland Society it was urged that the State could never be rid of the incubus of the free negro population until a State organization, prepared to take a more aggressive part in the accomplishment of its purpose than a mere auxiliary to a national organization could take, was put into operation. The situation of the State and her peculiar problem made necessary, they said, a separate organization.¹⁴⁰ What these peculiar conditions were was set forth as follows, by Latrobe, in a private letter to Gurley in 1834.

To prove Colonization, two things had to be established. The first, that colonies of colored people, capable of self-defence, self support, and self government could be founded on the coast of Africa. Second, that by means of these colonies, slave-holding States could be made free States. The first was proved by you. *The second remains to be proved.* Upon proof of the second now hangs the whole system. The first step to be taken to prove it, is to get a slave-holding State to determine to make the experiment. This, which, three years ago, was hardly within the range of any reasonable probability, has been done; and Maryland is now striving to establish the second branch of the proposition, and to prove that, by means of colonies on the coast of Africa, a slaveholding State may be made a free State.

Now, it appears to the Board of Managers, that the success of Maryland will have such all powerful effect upon Virginia, Kentucky, Tennessee, and North Carolina, that the whole influence of the friends of colonization, everywhere, ought to be devoted to her aid. If colonization, they think, were to stand still, in every other State, until Maryland succeeded in her undertaking, yet provided she did succeed, no mischief would be done, but, on the contrary, all the assistance that had been given her would be amply compensated by the then omnipotent influence of her example.¹⁴¹

¹³⁸ Minutes of Board of Managers of American Colonization Society, MS., Apr. 4, 1831.

¹³⁹ Letters to American Colonization Society, MS., Latrobe to Gurley, Baltimore, Md., Mar. 30, 1831.

¹⁴⁰ Minutes of Board of Managers of American Colonization Society, MS., Apr. 4, 1831.

¹⁴¹ Letters of American Colonization Society, MS., Baltimore, Md., Latrobe to Gurley, December 29, 1834.

The Board of Managers made a very earnest attempt to dissuade the Maryland Society from independent action. They called attention to the fact that the views of Colonizationists in different parts of the country had already begun to vary widely, and "the friends of the cause are beginning to operate in their several ways, a multiplicity of interests will engender collision of views and of vital interests. Hence it becomes and continues of paramount importance that some salutary control should be concentrated in the Parent Society."¹⁴² In a continuation of the policy of separate action the parent society would be rendered utterly impotent, for not only would each of the Southern States pursuing that policy, act upon its own local views, but the Northern States Societies, seeing that there was no central control and no uniformity of policy, would discontinue their support. And yet, with the most forceful protest it could make, the parent society saw that there was no means of compelling the Maryland Society to continue its auxiliary relation, and its attitude was that of a willingness to surrender every point at issue, except the vital one of dependence. Even this the Maryland Society compelled it to give up also; and from 1833 the active operations of the two societies were entirely separate, the Cape Palmas settlement and territory comprising about one thousand square miles in the southern part of Liberia. Here Maryland sent her emigrants and established them under laws which entirely excluded ardent spirits from the settlement.¹⁴³ Within the next five years the Maryland Society sent out nine expeditions.¹⁴⁴

In November, 1833, requests came from the Philadelphia and New York societies for permission to act with a considerable degree of independence. They desired to establish jointly in Liberia settlers taken out and governed, in Africa, almost entirely by themselves. The shadow, but

¹⁴² Minutes of Board of Managers of American Colonization Society, MS., April 4, 1831.

¹⁴³ *African Repository*, vol. xvii, pp. 184-186.

¹⁴⁴ *Ibid.*, vol. xiv, p. 33 ff.

not the substance, of the auxiliary relation was to continue as heretofore. Undoubtedly the most energetic and persistent agitator for this independent relation was the Philadelphian, Elliot Cresson, one of the most zealous partizans and certainly the most belligerent Friend the Society ever had. His reasons for desiring independence, he said, were: (1) the inefficient management of the parent Board of Managers, and (2) the unsatisfactory colonial governor recently appointed and sent out.¹⁴⁵ Also, there is no doubt that Cresson was anxious for the establishment, upon Quaker principles, of a settlement whose name should be Penn, or Benezet. Other reasons doubtless were, the comparative inactivity of the parent Society in sending out emigrants during 1833, arising from a want of funds; also the delivery of several speeches at the annual meeting, which did not meet with the entire approval of the New York or Philadelphia delegates. Also, there is no doubt that the charge of Cresson against the colonial governor or agent was general in the North Middle States.¹⁴⁶

Gurley wrote from Philadelphia, where he went in 1835, in an effort to reconcile the differences between the Philadelphia and New York Societies, on the one hand, and the parent society, on the other, suggesting that the demand for independent action had arisen from (1) "the general sentiment of the friends of colonization at the North demanding that colonization societies should be *avowedly* and *decidedly* hostile to slavery," and (2) "a distrust in the management of the Board at Washington utterly destructive to its influence as the exclusive director of the funds."¹⁴⁷ Indeed, by 1834, there was excited in the Northern colonization societies a strong, and almost uncontrollable, tendency toward aggressive action on the subject of slavery,¹⁴⁸ and the danger undoubtedly was, not that the Society would tend to

¹⁴⁵ Letters of American Colonization Society, MS., Cresson, Philadelphia, Nov. 20, 1833.

¹⁴⁶ Ibid., Confidential, Gurley, Philadelphia, Apr. 1, 1834.

¹⁴⁷ Ibid., Gurley to Board of Managers, Philadelphia, May 1, 1835.

¹⁴⁸ Ibid., Gurley to Fendall, New York, May 31, 1834.

perpetuate slavery, but that it was rushing into such radical action that it would lose once and forever the cooperation of the slaveholding border States. And yet, it was just at this time that *The Liberator* was spreading throughout New England the "facts" about the Society, that it was a device of the slaveholders to rivet the chains of their slaves! The truth is that *The Liberator* lived on sectionalism; the Colonization Society would have been killed by it.

The effort of Gurley in this crisis was to inject, by cooperation, the anti-slavery spirit of the North into the South and bring about, by peaceable means, the gradual abolition of slavery. This danger of a division among the societies, so decided as to result, in all likelihood, in a separate organization of the northern group of the Middle and the New England States, and the resultant alienation of the South from the whole movement, was foreseen and dreaded by the Board of Managers. "As the population to be especially benefitted by this Society mostly reside at the South, . . ., it is of extreme importance, that the people of the North should remain united with those of the South, in the plans and measures that may be devised and executed for their good."¹⁴⁹ But it was again as it had been in the case of the Maryland Society. The parent society could argue and urge but it could not force the Philadelphia and New York Societies to continue their former relations. As Gurley wrote: "If we cannot have things as we would, we must do the best we can." The result was a compromise, but a compromise in which the associated societies got practically all that they asked for. In July, 1834, preparations were being made to send to their colony at Bassa Cove one hundred slaves liberated by Dr. Hawes, of Virginia. The parent board commented: "it now presents the community with the spectacle of more than one hundred freemen, who, but for it, would still have been slaves. And one hundred more are waiting merely till the parent board, or its auxil-

¹⁴⁹ Minutes of Board of Managers of American Colonization Society, MS., July 3, 1834.

iaries, possess the means to place them as freemen in the same company."¹⁵⁰

As Cresson had been the guiding spirit in the restlessness of the Northern societies in their relations with the parent body, so, it seems, Robert S. Finley, a son of the Rev. Robert Finley, who had a leading part in the organization of the Society, was stirring up the Southwest. Of the two men Gurley wrote: "Finley and Cresson both, are excentric and erratic, but will not fail to stir the elements in their course." And if he said of Cresson, "I have just seen Mr. Cresson and heard only complaints from him for three hours," he could have said the same thing in reference to the directness, if not the duration, of Mr. Finley's remarks. There is some probability that the desire of the Louisiana and Mississippi societies for independent action, resulted more directly from the efforts of Mr. Finley, but also more or less remotely from the encouragement they received from both Latrobe and Cresson.¹⁵¹ The relations between the Mississippi and Louisiana Societies, after they withdrew from the status of purely auxiliary societies, were still far from independent, and were of comparatively short duration.

So far was the American Colonization Society from being the creature of, and under the dominance of, the Maryland and Virginia slaveholder, we have seen that Maryland established an altogether distinct settlement; and in 1838 the Virginia Society was on the verge of following the example of her sister State. At the annual meeting of that year a motion, made by the Attorney-General of the State, Sidney S. Baxter, to recommend to the Board of Managers the establishment of an independent colony in Liberia, was carried, though the Board of Managers did not act favorably upon the recommendation.¹⁵²

A third difficulty that the Society had to face during this

¹⁵⁰ Ibid., July 3, 1834.

¹⁵¹ Letters of American Colonization Society, MS., Gurley to Gales, Natchez, Miss., May 9, 1836; Gurley to Fendall, May 11, 1836; May 16, 1836; June 3, 1836.

¹⁵² African Repository, vol. xiv, p. 120.

eventful decade was the financial embarrassment in which it found itself. There was hardly a time, before the Civil War, when the Society's opportunities were not limited by its means. But it usually managed to keep its head above water by refusing to allow its expenditures to exceed its revenue. In 1834 the treasury was empty and thousands of dollars were due, and there was nothing with which to pay. The receipts for the three years, 1831, 1832, and 1833 were \$105,606.69; the expenditures, \$115,349.91, leaving a deficit for those years of nearly \$10,000.00. The number of emigrants transported during the same period was 1339.¹⁵³ The receipts, which had never been as much as \$20,000.00 prior to 1830, were \$26,583.51 that year; and by 1834, they had mounted to \$51,662.95. But in 1838 they were only \$11,597.¹⁵⁴ Of its receipts in 1835, \$4079.95 had been secured as donations; in 1838, the donations amounted to only \$2,438.73.¹⁵⁵ The hard times of 1837 doubtless had much to do with the decreasing revenue of the Society during the last years of the decade.

And this was not all. The ruinous practice of purchasing provisions in Liberia on credit, and paying for them by writing drafts on the Board of Managers; the very unsatisfactory and loose condition in which the accounts were kept; the accumulation of accounts, and hence debts with the Liberian merchants, of which the Managers were ignorant; and the want of care and economy in Liberia were among the causes of a debt which the Board estimated, in 1834, to be between \$45,000 and \$50,000, and which was later estimated to be some ten to twenty thousand dollars in excess of that amount.¹⁵⁶

How are we to explain this debt? Of the several con-

¹⁵³ Minutes of Board of Managers of American Colonization Society, MS., Feb. 20, 1834.

¹⁵⁴ Ibid., Feb. 20, 1834; African Repository, vol. xii, p. 28; vol. xv, p. 18.

¹⁵⁵ African Repository, vol. xii, p. 28; vol. xv, p. 18.

¹⁵⁶ Minutes of Board of Managers of American Colonization Society, MS., Feb. 20, 1834; Letters of American Colonization Society, MS., Wilkeson to John Ker, July 25, 1830, no. 680.

tributing causes, the most important, in all probability, were the hard times of the decade and the absence of men of business ability and experience on the Board of Managers. There has been found no evidence whatever that any of these men were guilty of personal profit. Even *The Liberator*, which exulted in the debt, could make good no charge of dishonesty against the managers. But it was a wise warning that Cresson, himself a successful business man, gave, as early as 1831, when he said: "Your Board are so terribly afraid of DEBT, that to save incurring \$1000 *now*, they subject themselves to two alternatives—starving the emigrants, or being drawn on for \$5000 [bye] and bye."¹⁵⁷

Provisions should have been purchased in the United States, where they could be purchased for a reasonable sum, and the Board should have kept itself regularly informed of the amount of the drafts it would be called upon to pay, if, indeed, it allowed the drawing of drafts without its own consent. It should have refused to pay drafts for which properly signed vouchers did not appear. These things it failed to do and, beginning about 1832, its financial difficulties began to grow more and more serious. By 1833 its drafts were being protested and soon its credit was destroyed.¹⁵⁸ It was too late to correct the mischief already done, but the Managers made an effort to introduce a more businesslike system for the future. A salaried treasurer was appointed, and he was to be at all times strictly accountable to the Board.¹⁵⁹

At the annual meeting of the Society in 1833, its Managers were called upon to submit a "full and detailed statement" of the origin, rise, and present condition of the debt. Its reply was a very frank statement of the facts above set

¹⁵⁷ Letters of American Colonization Society, MS., Cresson to Gurley, Philadelphia, Apr. 12, 1831.

¹⁵⁸ Ibid., Gurley to Fendall, New York, June 19, 1833; T. W. Blight and Gerard, Philadelphia, June 19, 1833.

¹⁵⁹ Minutes of Board of Managers of American Colonization Society, MS., Aug. 12, 1833.

forth. The opportunities were so great in 1832, it was stated, and the tendency of the Society had been so evidently to bring about the suppression of the slave trade, the enlightenment and civilizing of Africa, the removal of the "positive impediments to the free exercise of the right to emancipate slaves," and to transport to a land where he could be not only physically but also mentally and spiritually free, the "free" man of the United States, that the Managers had been led to undertake too much, and with too little means or opportunity for supervision. To correct the trouble, it was proposed (1) to enlarge the powers of the colonial council, so that the colonists might select their own officers, make their own laws, and bear the expense of their own government; (2) to offer stock on a loan of \$50,000 and provide a sinking fund to relieve them from their present embarrassment.¹⁰⁰

Early in 1834 Dr. Mechlin, the colonial agent, resigned.¹⁰¹ Whether true or false, there had been reports that in the colony he had been guilty of profligacy.¹⁰² And the Managers subsequently reported on his agency with anything but praise. Many of the items in his report were left unexplained. Since 1830 over 1800 gallons of brandy, whiskey, and rum had been purchased in the colony, most of it, they believed, by Mechlin himself, and used in the trade with the natives. Against this practice the Board entered a solemn protest.¹⁰³ Whatever blame for the very poor state of the Society's finances is placed upon the Board of Managers, and it would do violence to the truth to try to relieve them of a considerable responsibility for it, that blame must be shared also by the colonial agent, for his administration was exceedingly unbusinesslike. The Springfield Republican probably named the chief causes of the financial difficulty:

¹⁰⁰ *Ibid.*, Feb. 20, 1834.

¹⁰¹ *Ibid.*, Mar. 6, 1834.

¹⁰² Letters of American Colonization Society, MS., Confidential, Gurley to Gales, Philadelphia, April 1, 1834.

¹⁰³ Minutes of Board of Managers of American Colonization Society, MS., July 24, 1834.

(1) the Liberian merchants, in charging exorbitant profits upon stores furnished the colonists, and to an amount far beyond the expectation of the Managers, (2) the large emigration of colonists in 1832, when the Society was already beginning to be in debt, (3) the want of practical, business-like management and supervision on the part of the Managers.¹⁶⁴

As a part of the Board's policy of retrenchment to rid it of the debt was the reduction in number of expeditions of emigrants to the colony. But this step was opposed by the Society's Northern friends, who thought that under no circumstances should economy follow that channel. The result was that some refused to give, so long as emigrants were refused transportation, and that which the Board had supposed would result in a saving really resulted in cutting off a portion of its revenue. In the annual meeting of 1835, the New York delegation made it very plain that they were dissatisfied with the business administration of the Managers.¹⁶⁵ And yet the funds of the parent Board were being still further reduced by the fact that the New York and Pennsylvania Societies, in their comparative independence, were collecting funds in the Kentucky and Tennessee country. It was this that called forth the following remonstrance from the Board:

If, in the opinion of auxiliary societies . . . the Parent Board, after a toilsome, gratuitous, and measurably successful service of eighteen years resulting in the establishment of a Christian Republic on a heathen shore, can now be dispensed with advantageously to the cause for which it has made such heavy personal sacrifices, and encountered so many obstacles, it would willingly retire from its trust . . .; but . . . if the continuance of the Parent Society be desirable, its efficiency ought to be unimpaired; and . . . in the deliberate judgment of this Board, the separate, independent action of auxiliary societies must inevitably lessen the resources of the Parent Institution, and its importance in the public eye; . . . and finally make the system itself a victim to multiplied objects and disconnected operations.¹⁶⁶

From this date until the reorganization of the Society in

¹⁶⁴ Springfield Republican, May 17, 1834.

¹⁶⁵ African Repository, vol. xi, pp. 44-45.

¹⁶⁶ Minutes of Board of Managers of American Colonization Society, MS., May 12, 1836.

1839, the relations between the parent Society and the associated Pennsylvania and New York Societies were peculiarly exasperating to the parent Board. Extraordinary bills were presented to it by those societies, on the one hand; and on the other, those societies which had, at the time of the agreement on the independent relations that the two societies should enjoy, pledged to pay over to the parent treasury annually a per cent of their receipts, failed to meet their obligations to the parent Board.¹⁶⁷ The result of the disagreement was a request by the Pennsylvania Society for the reorganization of the Society.¹⁶⁸ The meeting that resulted made proposals which were very similar to the changes actually made at the annual meeting, in 1839.

The unusually small revenue of the Society in 1838 is to be accounted for not only by the circumstances to which reference has been made, but also to the great scarcity of money after the panic of 1837. The first speech Clay made, as President of the Society, January, 1836—the preceding presidents of the Society having been, with the dates of their election: Judge Bushrod Washington, Jan. 1st, 1817; Charles Carroll of Carrollton, Jan. 18th, 1830; James Madison, Jan. 20th, 1833—set forth clearly the fact that the Society had not yet given up hope of aid from the Federal Government, and that a further application might be expected in the time of the Society's need.¹⁶⁹

But the most interesting effort to bolster up the financial affairs of the Society was an appeal to the people of the United States, signed by sixty-six leading men of the country, and resulting from a meeting held in May, 1838. Among the signers were C. F. Mercer; Governor Levi Lincoln of Massachusetts; John H. Prentiss, the editor; Samuel Wilkeson, New York pioneer and one of the founders of Buffalo; Charles C. Strattan, later governor of New Jersey; Ex-Governor Samuel L. Southard, who was at one

¹⁶⁷ *Ibid.*, Apr. 6, 1837; Sept. 28, 1837; Dec. 27, 1837; June 15, 1838; Oct. 16, 1838.

¹⁶⁸ *Ibid.*, 1838, *passim*.

¹⁶⁹ *African Repository*, vol. xiv, pp. 17-18; vol. xix, p. 369.

time Secretary of the Navy, and served in many important offices, State and Federal; James Murry Mason, author of the Fugitive Slave Law of 1850; William C. Rives, United States Senator and Minister to France; William Maxwell, college president, editor, lawyer, and member of the legislature; Henry Clay, John Pope, of Kentucky, a president pro tempore of the United States Senate; Governor and Congressman John Chambers, of Kentucky; John J. Crittenden, twice attorney-general and a United States Senator; Elisha Whittlesey of Ohio, and Albert S. White, United States Senator and railroad president. Of the sixty-six signers, thirty-five were from the States north of Virginia, including two from the District of Columbia, and excluding Maryland; twenty-three were from the States, Kentucky, Tennessee, Ohio, and Indiana; and eight were from Virginia, North Carolina, and Louisiana.¹⁷⁰

A fourth difficulty that the Society had to face was the condition of affairs in Liberia. Incompetence in the colony was not unconnected with incompetence in the Board. If the Board had provided sufficient supplies and sent them with the emigrants, much of the debt and much of the dissatisfaction in Liberia would never have existed. In June, 1830, Mechlin, colonial agent, was in the United States and reported on conditions in the colony. At that time, he urged the Board to make its own purchases of provisions and send them out with the colonists. He warned them that goods purchased of colonial merchants and paid for by drafts on the Society would be at an advance of from one hundred to two hundred per cent over the cost of the same goods in this country. Agricultural implements were needed; also building tools and nails.¹⁷¹ Three years later he wrote from Liberia repeating his request. Each vessel of immigrants should bring also provisions for their subsistence for six months.

¹⁷⁰ *Ibid.*, vol. xiv, pp. 130-135.

¹⁷¹ Letters of American Colonization Society, MS., Mechlin to Gurley, Washington, June, 1830.

The means at the disposal of the Board will thus be economized, and the necessity of such heavy drafts from this quarter be obviated, and a fruitful source of murmuring and dissatisfaction be removed. . . . The emigrants pr. Brig Roanoke were landed without one ounce of provisions or other supplies, in consequence of which I have been obliged to purchase of Capt. Hatch.

The arrival of the large number of emigrants sent out in 1832, seven hundred and ninety, two hundred and forty-seven of whom were manumitted slaves,¹⁷³ caused the agent much embarrassment on account of inadequate provision for receiving them.¹⁷³ Some of the expeditions contained intelligent and industrious negroes, but these were, as a class, free negroes. Mechlin remarked:

Had we for twelve or eighteen months past received 300 or 400 people of this description instead of the shoals of emancipated slaves who have been landed on our shores, the colony would have presented a very different aspect, and instead of the miserably depressed state of agriculture we should have had flourishing plantations. . . .¹⁷⁴

Here was a practical demonstration of the danger of a universal and immediate emancipation of all the slaves in the United States. Between the crossfire of the Northern Colonizationists, who demanded that more emigrants be sent out and that those who were sent out should be chiefly those emancipated for this express purpose, and the colonial governor, who insisted that more provisions should be purchased and sent with emigrants and that those who were sent out should be not too largely of the recent slave class, there is no doubt that the problems of the Board were serious and pressing, especially as the Southern slaveholders were supplying all the slaves the Society could attempt to transport. The perplexities of the situation will be understood when attention is called to the fact that, despite the advice of the colonial agent to the Board, Elliot Cresson, who, if he was ignored, would have stirred up a hornet's nest from Maine to Louisiana in order to gain his point, wrote to the Society: "I would beg that if only 227 are slaves, out of the 800 sent last year, you will from motives of sound pol-

¹⁷³ *African Repository*, vol. viii, p. 366.

¹⁷⁴ Letters of American Colonization Society, MS., Mechlin to Gurley, Liberia, Feb. 26, 1833.

¹⁷⁴ *Ibid.*

icy, keep it out of notice"; and again, "Can you from all sources send 2800 this year instead of 800, if funds are found?"¹⁷⁵

Word began to come from Liberia in 1833 that the condition of the colonists was anything but desirable. Protests came to the Managers from Maryland Colonizationists,¹⁷⁶ and from other interested persons. J. B. Pinney, one of the most successful agents the Society ever had, was in Liberia in 1833 and wrote: "At present it is disheartening to go among the sick. The constant complaint is 'we have no sugar, nor molasses, nor rice,' etc. etc. 'We can get no fresh soup, nor chicken.'" Pinney urged the Board to send nine months' provisions with each vessel of emigrants. Many of the houses, too, were leaky, he said, and many houses were not ready for occupancy, though they were badly needed. A great deal of the distress, he thought, was due to the selection of an incompetent agent, and one who lacked religion, interest and energy.¹⁷⁷ Very unsatisfactory accounts came also from a number of the colonists.¹⁷⁸ Gurley himself admitted the distress in the colony, and thought it was due in considerable measure to the incompetency of the agent.¹⁷⁹ In a word, this was the darkest hour in the history of the colony. Its darkness was rendered all the more prominent by the fact that it followed a period of great promise in Liberia. Reports had been coming in of the prosperity of the colonists, and it was believed the time had come when the operations of the Society could with safety be greatly enlarged.¹⁸⁰

¹⁷⁵ Ibid., Cresson to Gurley, Glasgow, Scotland, Mar. 15, 1833.

¹⁷⁶ Ibid., C. C. Harper to Gurley, Baltimore, Apr. 13, 1833; Wm. L. Stone to Gurley, New York, Mar. 19, 1833; C. C. Harper to Gurley, Baltimore, Apr. 24, 1833; Miss Christian Blackburn to Gurley, Clay Mont, Va., May 22, 1833.

¹⁷⁷ Ibid., J. B. Pinney to Gurley, Liberia, May 17, 1833.

¹⁷⁸ Ibid., Phillip Moore to Gurley, Liberia, May 10, 1833; July 27, 1833; Remus Harvey to Gurley, Liberia, July 30, 1833; H. Teage to Gurley, Liberia, July 30, 1833.

¹⁷⁹ Ibid., Gurley to Fendall, New York, Oct. 4, 1833; Gurley to Gales, New York, April 17, 1834.

¹⁸⁰ Minutes of Board of Managers of American Colonization So-

It would be unjust to accuse the Board of Managers of a wilful neglect of the Colony. The minutes of that Board bear convincing testimony to the sincerity and philanthropy of those who controlled the Society. There is no doubt that the distress of the colonists weighed heavily upon those Managers. If, then, it be asked what was the cause of it all, the answer must be that there were a number of contributing causes. The following are suggested as the most important: (1) the lack of experienced, practical, business men in the membership of the Board, (2) the incompetency, if not the sheer negligence, of the colonial agent, (3) the insistence of Northern Colonizationists upon a too vigorous colonizing policy, when viewed in connection with the preparations in Liberia for receiving immigrants, (4) the importation of too large a proportion of slaves among the colonists and (5) the financial embarrassments of the Society. Finally, among the problems of which it seems important to speak at this stage of our inquiry, is the movement toward and the accomplishment of the reorganization of the Society.

The American Colonization Society was reorganized undoubtedly through the initiative of the Philadelphia and New York Societies. Among those who urged such a change, Elliot Cresson was the leader. Of Cresson, Isaac Orr, an agent of the parent Society, wrote in 1830 he "has the patronage of Philadelphia under his thumb, to a greater extent that I dare tell *him*. . . . And woe to the day when that commanding influence shall in *any way* be broken or thrown aside."¹⁸¹ From 1830 until the reorganization had been consummated, this belligerent Friend lost no opportunity to tell the Board, in the most direct terms, what he thought of them. He wrote Gurley in August, 1830: "must I believe that there is something in the atmosphere of your City militating against the performance of business

ciety, MS., Nov. 22, 1830; Feb. 28, 1831; Letters of American Colonization Society, MS., Wm. A. Weaver to Gurley, Washington, Dec. 28, 1831.

¹⁸¹ Ibid., Orr to Gurley, Philadelphia, July 15, 1830.

according to universal usage elsewhere?" The uncertainty of the Board's plans for sending out a proposed expedition of emancipated slaves, which, at the Board's request, he had put himself to considerable inconvenience to arrange for, called forth from him the following remark: "Your Board give me leave to write to McPhail. What am I to write about? I can form no guess of their intentions. . . . You must select your own vessel and relieve me from further anxiety and chagrin. Another such would bring on a nervous fever judging from what I have already suffered." In the form of a confidential postscript, he adds: "By the way what a perverse set you are at Washington. . . ." ¹⁸² Again he wrote: "So little does your honorable and reverend Board seem to think it worth while to conciliate the confidence and kindly feelings of your patrons . . . that I almost despair of ever getting a satisfactory answer to any subject that I may trouble you with." ¹⁸³ Again, he writes:

I now demand your *ultimatum*, promptly; or I forever wash my hands of the concern. You pledged yourselves to send 100 on the 11th October. Do you, I ask, intend to redeem that pledge? If so, there is no time to be lost. If not, I will take the advice of my physician, go in the country and leave you to get a vessel when it suits you. . . . Don't forget the sawmill. It is of first importance. The plantation ground ditto. *Schools* ditto. ¹⁸⁴

In 1833 Cresson was in England and Scotland for the purpose of arousing an interest in favor of Colonization and of undoing the influence of the Garrisonians, who were there painting in the very darkest colors the motives of American Colonizationists. Of this Abolition influence in the British Isles he writes: ". . . unless you mean to abandon England ingloriously to these modern Vandals you *must* turn over a new leaf. . . . It is only by laborious search, that I occasionally light upon a straw to keep me from sinking." ¹⁸⁵ Upon his return, he refers to Gurley as "that paragon," for having as Cresson says, "denounced

¹⁸² Ibid., Cresson to Gurley, Aug. 5, 1830.

¹⁸³ Ibid., Cresson to Gurley, Sept. 6, 1830.

¹⁸⁴ Ibid., Cresson to Gurley, Sept. 10, 1830.

¹⁸⁵ Ibid., Cresson to Gurley, Glasgow, Mar. 15, 1833.

me for making complaint, after I had in vain *implored* him to do the cause and myself justice before the British public year after year."¹⁸⁶ But Gurley was so accustomed to Cresson's hyperboles that, as he commented: "I have become somewhat hardened against them."

As Cresson was busy in the North Middle States working up sentiment in opposition to the existing organization, so Robert S. Finley was, in the Western country, exerting a similar, though markedly less powerful influence. Summing up the objections met with against the methods of the Board, he names them as follows: (1) a want of system and energy in the Board in the execution of its plans, (2) failure to send out expeditions at the time at which they were advertised to sail, (3) failure to establish, in Liberia, a settlement on the higher and more healthful territory, (4) failure, on the part of the officers of the Society, to reply to important communications from contributors, slaveholders offering slaves, persons asking for advice and information, and so on.¹⁸⁷

The testimony of these two men contains an important element of truth, but both undoubtedly went much too far in their charges against the Managers. So far as they charged business incompetency, they did an important service in pointing out the need of reform; so far as they charged dishonesty and impure motives, their charges fall completely to the ground. Not many men realized the heavy burden that rested upon the secretary of the Society. A man, who, like Gurley, was admirably and primarily fitted to keep the sections together and inspire in men of every part of the Union an interest in the cause, was not likely to be possessed of those qualities which make an admirable office secretary, such a man, for instance, as Judge Samuel Wilkeson, who was soon to give new life to the affairs of the organization. Gurley was contemplative rather than

¹⁸⁶ Ibid., Cresson to Gales, Philadelphia, May 4, 1835.

¹⁸⁷ Ibid., Finley to Gurley, Ohio River, Sept. 11, 1831; W. Meade to Gurley, December 6, 1831.

energetic; a thinker rather than an actor. It was his duty to keep up, both through the press, through the agencies, and by his own personal visitations to various parts of the country, an active interest in the subject of Colonization; to superintend, from New Orleans to Maine, the collection of funds, the preparation of expeditions, their provisioning, and the collecting of emigrants; the general supervision over the administration of the colonial agent in Liberia, and the impartial and judicious treatment of so dependent a class as those received into the colony—all this, and a general supervision of the government of a colony four thousand miles from home, a colony from which much was hoped, both for America and for Africa.

All this had to be done, and the Society that attempted it was supported by no endowment, no financial aid from the government, except some very inadequate aid from several of the State legislatures. And the Society was not even incorporated until nearly the end of the period of which we here speak. In these days of duplicators, typewriters, stenographers, fast mail trains, and a highly developed postal system, we probably do not appreciate the burdens that a man of such position as that occupied by Gurley had to bear. The task of the Abolitionists was to agitate the subject of slavery in the States north of Mason and Dixon's line. The task of the Colonizationist was to conciliate the North and the South, to agitate the peaceable and gradual abolition of slavery and the transportation of the blacks to Africa, and to found on that continent a republic where freedom could be actually experienced and which would be a model for the rest of Africa.

Reorganization was being talked of as early as 1834. In that year Leonard Bacon of New Haven, Connecticut, suggested that the active management of the Society be placed in the hands of five or seven men and, to prevent the possibility of their using unwisely their power, that they be made subject to a supervisory body. Reports should be made at each annual meeting, and at these meetings representation

of auxiliary societies should be in proportion to the amount of funds contributed to the parent treasury.¹⁸⁸ Dissatisfaction was further evidenced, at the annual meeting in 1835, when a delegate from the New York Society made an effort to secure the election on the Board of Managers of four additional men, two of them aggressive members of the Pennsylvania Society, and by an effort by the same member to secure the passage of resolutions calling on the Board of Managers to reduce their office expenditures. These efforts failed.¹⁸⁹

Whatever accusations are made concerning the distribution of seats on the Board of Managers, the only body, prior to 1839, which had an active part in shaping the policies of the Society, there can be no complaint made on the score that the selection of those officers was in the hands of the South after 1836, and it appears there is no evidence that at any time since its organization in 1817 it pursued a pro-slavery policy. In 1836 the members of the committee which at the annual meeting nominated the Managers was composed of two delegates from New York, two from Virginia, and one from Ohio.¹⁹⁰ For 1837, all five members of the nominating committee were from the Middle and Western States, not a Southern State being represented on the committee,¹⁹¹ although the appointments were made by the chairman, C. F. Mercer, of Virginia. The Managers elected for 1837 were reelected for 1838.¹⁹²

From 1837 to the time when the reorganization of the parent Society was effected, the New York and Philadelphia Societies pursued a policy calculated either to kill the older organization or to force it to submit. It must not be forgotten that of all the societies in the United States, these two were able to command the largest financial resources. They were powerful enough to secede from the parent So-

¹⁸⁸ *Ibid.*, Bacon to Gurley, New Haven, Conn., Jan. 3, 1834.

¹⁸⁹ *African Repository*, vol. ii, pp. 49-50.

¹⁹⁰ *Ibid.*, vol. xii, p. 12.

¹⁹¹ *Ibid.*, vol. xiii, p. 35.

¹⁹² *Ibid.*, vol. xiv, p. 29.

ciety and, in cooperation with New England, establish an organization that would undoubtedly have alienated the South immediately from the whole scheme, and it must be repeated that the orthodox Colonizationist was never a sectionalist, never a disunionist. Between 1837 and 1839 these two societies jointly presented bills for the payment of which the parent Society was in no sense obligated to them, and failed to redeem pledges made by them to the parent Society for the payment of a percentage of their collections in New York and Pennsylvania.¹⁹³ After the reorganization was effected, a referee, himself a citizen of New York, decided every material point favorably to the parent Society.¹⁹⁴

In 1837 an effort was made among the New York, Pennsylvania, and Maryland Societies to agree upon a "Constitution of General Government for the American Settlements on the Western Coast of Africa." The proposed plan was accepted by the New York and Pennsylvania Societies but rejected by that of Maryland. It was then proposed that the three organizations send delegates to Philadelphia for the purpose of effecting a union among themselves. This the Maryland Society refused to do. Instead, it was agreed to send to the Washington Society's office an "Outline of a new Constitution for the American Colonization Society," which should replace the constitution then in force. The parent Society was requested to send copies of the proposed changes to the several auxiliaries, to be considered by them and voted upon at the annual meeting at the end of 1838.¹⁹⁵ By the terms of this proposed constitution, the Board of Managers was to be replaced by (1) a Board of Directors, and (2) an Executive Committee. By the old constitution, the Managers had been chosen at

¹⁹³ Minutes of Board of Managers of American Colonization Society, MS., April 6, 1837; Sept. 28, 1837; June 15, 1838; October 16, 1838.

¹⁹⁴ Minutes of Board of Directors of American Colonization Society, MS., vol. iii, pp. 419-422; African Repository, vol. xv, p. 19 ff.

¹⁹⁵ African Repository, vol. xiv, pp. 287-289.

the annual meeting by a vote of all members who were in attendance. By the proposed constitution, the Society was to be composed, not of individuals as units, but of State societies as units. The Board of Directors was to be a body composed of delegates chosen by the State societies; each such society contributing not less than one thousand dollars to the parent treasury to be entitled to one delegate, or member of the Board of Directors. Each such society having under its care a colony was to be entitled to two members of the Board; any two or more such societies uniting in the support of a colony, comprising at least three hundred persons, were to be entitled to two members, each, on the Board.

By the proposed plan, the Board of Directors was to meet annually, when they were to appoint an executive committee, with such paid officers (ex-officio members of the executive committee) as was deemed wise. The executive committee was thus a sort of subcommittee of the Board and was subject to its supervision and authority. By the proposed plan, each auxiliary society was to be allowed to send as many as five delegates to each annual meeting of the Society.¹⁹⁰

In the meantime there had been a correspondence among leading Colonizationists in reference to the wisdom of making so radical a change as it was proposed to make. Thomas Buchanan, later Colonial Governor of Liberia and already a leading member of the Pennsylvania Society, thought that the change should be entire, in so far as the relations between the several auxiliary societies to the parent organization was concerned. "I would have a general Board of Delegates from all the State Societies which were willing to unite for that purpose, with powers of legislation for the Colony, the appointment of officers, etc. But without the power of sending out emigrants which should be reserved to the State societies." He favored the establishment, in Philadelphia or New York, of an executive committee. He

¹⁹⁰ Ibid., vol. xiv, pp. 287-289.

thought the societies that had established independent colonies in Africa should surrender their jurisdiction to a common government organized by the parent organization.¹⁹⁷

Elisha Whittlesey, of Ohio, thought that there were changes needed in the organization, "but," said he, "I think we should correct, and not annihilate." Of the proposed board, composed of representatives from the State societies, to have supervision over the colonies in Africa, he thought: "Such a Board would never form, or if at all, not more than once, or twice. You could not obtain delegates from Louisiana, Tennessee, and Kentucky who would meet here or at the East, to attend to the concerns of the Society." It had been proposed also to put the control of the finances of the Society in the hands of the New York and Pennsylvania societies. Whittlesey's comment was: "Such a step would cut you off from the South at once. We want to inspire more confidence in the South, instead of lessening that which we have." As to the location of the central office, for there was a movement to make Philadelphia or New York the central office, he thought it should be located "at the seat of the General Government, on common, neutral ground. Here the Managers are easily collected together, and they better understand how to harmonize the discordant elements at the North and at the South than those who reside elsewhere. The New York and the Pennsylvania Society must not leave us either. Whatever is wrong must be corrected, and then we must have more zeal and energy."¹⁹⁸

The views of Gurley were very similar to those of Whittlesey. He called attention to the fact that the movement for reorganization was distinctly a movement of the Pennsylvania and New York Societies; that whatever criticism they made of the administration of affairs by the Board of Managers came with poor grace from the very societies

¹⁹⁷ Letters of American Colonization Society, MS., Thomas Buchanan to Samuel Wilkeson, Philadelphia, May 10, 1838.

¹⁹⁸ Ibid., Whittlesey to Wilkeson, Washington, June 3, 1838.

which had sanctioned those elections; that the energy of the parent organization had been impaired by the refusal of these two societies, the most able to contribute, to redeem their pledges; that the Managers, far from profiting by their connection with the Board, had often assumed voluntarily the responsibility for large amounts which, had they been called on to make good, would have weighed heavily upon them. He favored an early settlement of the relations between the auxiliary and the parent societies, but thought that the central office should, by all means, remain at the national capital. "To destroy the parent Board," said he, "is, in my judgment, to ruin the cause at the South."¹⁹⁹ Joseph Gales, a North Carolinian by birth, who since 1834 had been the treasurer of the parent Society, put the blame for a considerable part of the financial distress of the Society directly upon the New York and Pennsylvania societies, through their refusal to meet the pledges made by them at the time of the agreement by which they pursued an independent policy. And this, he thought, was the chief cause of the widespread criticism among the Society's friends.²⁰⁰

During this discussion of the changes desirable in the parent society, Judge Samuel Wilkeson of Buffalo, New York, and one who may, with considerable justice, be called the father of Buffalo, was invited by the Board of Managers to become general agent for the Society, with power to commission, instruct, or remove agents, as he thought necessary. To him was committed also the supervision of the finances. In short, he was made practically dictator of the Society's affairs in the United States.²⁰¹ Wilkeson accepted the task, magnanimously refusing compensation until the Society should be free from debt.²⁰² He threw himself into

¹⁹⁹ Ibid., Gurley to Wilkeson, Washington, June 4, 1838.

²⁰⁰ Ibid., Gales to Wilkeson, Washington, Aug. 4, 1838.

²⁰¹ *African Repository*, vol. xv, pp. 6-7; *Minutes of Board of Managers of American Colonization Society*, MS., Dec., 1838.

²⁰² *Letters of American Colonization Society*, MS., Wilkeson to Gurley, New York, July 7, 1838.

the work with an energy uncommon among men but characteristic of himself. Possessed of none of the suavity with which Gurley made friends wherever he went, inclined to underestimate the inspirational side of a movement based upon public opinion, he lived in Western New York, made money, got things done, was a chief among pioneers, and suffered from the gout.

Hardly had Wilkeson begun his duties in the Colonization cause, when Cresson began to complain about the need for reform. "I hope," wrote he, "you will dismiss the idlers at Washington next month and give the friends of the cause new hopes thereby that the *mice* in the treasury will not eat up all the *meal*."³⁰³ Here, as elsewhere, there was an element of value in Cresson's criticism, but it was far overstated. The Board might probably have done well to have dispensed with the services of one or two of its office force, after the cause came under such formidable discouragement, but Wilkeson himself found that the public had been misled in its belief that much further economy was practicable.³⁰⁴ The new general agent went to work with a will, however, and reported to the Managers in December, 1838:

I have found it very difficult to obtain such agents as are required. . . . In some sections of the country the hostility of abolitionists is dreaded. The cause of colonization has been so long neglected, that the societies heretofore organized have everywhere been suffered to die, and many men formerly warm colonizationists . . . are unwilling to encounter the difficulties now presented. Very many believe that the low state to which colonization [has come] is owing to the impracticability of carrying it on by private charity. . . . Very many others . . . believe that some radical change in the organization and management . . . is necessary to its success. Even in those sections . . . which have been abandoned to the abolitionists . . . I have found that a large proportion of the people are glad to hear once more of colonization and hail it as a great conservative principle that will save our country, and elevate the colored man.³⁰⁵

At the annual meeting in January, 1839, the interest was

³⁰³ Ibid., Cresson to Wilkeson, Woodstock, Vermont, Nov. 28, 1838.

³⁰⁴ Ibid., Wilkeson to Gales, New York, Nov. 16, 1838; Nov. 30, 1838; Gales to Wilkeson, Washington, Nov. 28, 1838.

³⁰⁵ Letters of Board of Managers of American Colonization Society, MS., Dec. 10, 1838.

intense. The New York, New Jersey, and Pennsylvania Societies sent delegations that numerically reached the maximum allowed by the rules. Besides, Virginia had a full and able delegation, her representatives being C. F. Mercer, Wm. C. Rives, James Garland, Henry A. Wise, and Abel P. Upshur. Of the total number of delegates, thirty-one, New York, New Jersey, and Pennsylvania sent seventeen, Virginia six, and the West four, the District of Columbia sending four.²⁰⁶ The reason for the full delegations is obvious. New York, New Jersey and Pennsylvania had come to bring about radical changes in the organization. These changes undoubtedly constitute the first official recognition, of consequence, of one section as opposed to another, in the constitution of the Society. They constitute the first step made by Colonizationists in the estrangement of the upper South and the Southwestern States. That some changes were needful for the very life of the Society is obvious. That those changes took the direction they did is altogether regrettable.

In the first discussion, at the annual meeting, there was no agreement between the delegates from the North Middle States and the Virginians. A committee, composed of two Southerners and four from New York and Pennsylvania, reported a compromise, in which the Virginians took what they could get, and it was adopted by the representatives and became, in name, the amended, but in fact, the new constitution. The changes adopted were not so radical as those recommended by the Maryland, Pennsylvania, and New York societies in 1837, but they were quite radical enough.²⁰⁷ The name and the object of the Society were, in the revised instrument, stated to be the same as in the old; but that was about all. It may be well to compare it with the original constitution, on the one hand, and with the proposed one, on the other.

(1) The name and professed object of the Society remain the same in all three.

²⁰⁶ *African Repository*, vol. xv, p. 19 ff.

²⁰⁷ See above.

(2) By the old constitution, the parent Society was a society composed of individuals; by the proposed constitution it was to be a federation of auxiliary societies; by the instrument actually adopted it was to partake of the nature of both. Every citizen of the United States who paid annually as much as one dollar into the treasury was to be considered a member; but membership on its Board of Directors, the actual governing power of the Society, was confined to societies contributing certain fixed amounts. Every society contributing not less than \$1000 was entitled to two directors of the Board; every society having under its care a colony was entitled to three delegates; every two or more societies jointly maintaining a colony of not fewer than three hundred settlers, was entitled to three delegates. Any individual contributing as much as \$1000 to the parent treasury was entitled to membership for life on the Board of Directors.

(3) By the old constitution, the Society was to meet annually; by the proposed instrument, the Board of Directors was to meet annually; by that adopted, both the Society and the Board of Directors were to meet annually.

(4) By both the proposed and the new constitutions, any State Colonization Society maintaining a colony in Liberia was given the right to appropriate its funds to the maintenance of such colony.

(5) By the new instrument, all sums paid into the treasury of the parent Society were, after the payment of expenses for collecting and after paying a certain portion of the existing debt, to be applied to the benefit of the colony of Monrovia, where the Colonial Governor was to reside.²⁰⁸

To understand how radical was this change, and how completely it deprived the South of even a respectable voice in the management of an enterprise in which it was asked and urged to make continued and important contributions, it is sufficient to call attention to the fact that the very first Board of Directors, after the adoption of the new consti-

²⁰⁸ African Repository, vol. xv, p. 19 ff.

tution, was composed of eight members from the States north of Maryland, two from those south of the District of Columbia, two from the District of Columbia, and two from Ohio.²⁰⁰ A whole section, itself the very center of operations of the Society, deprived of any effective representation in its proceedings, could not be expected to continue to exhibit an active interest. Indeed, when one takes into consideration the sectional bitterness of the time, it is remarkable how long some of the Southern States did lend their support to the movement that was now in northern hands. For years Virginia, Mississippi and Louisiana did important service for the Society. But from 1839 there is evident a new spirit, a spirit that must not be attributed altogether to the rise of cotton production but also to the loss of a hearing in the councils of Colonization.

But it may be asked, why did not the Southern States pay into the treasury enough to entitle them to an equal representation with the Middle States? Simply because of the two facts: (1) the South was not able to make contributions equal to those of the more prosperous section, and (2) no matter how many slaves a Southern slaveholder gave away for emigration to Africa, the South was not thereby given credit for a single dollar in its representation among the directors. The reorganizers of the Society committed a capital blunder in ignoring this important fact. And then there was that other consideration, to which Whittlesey had already called attention. New York and Pennsylvania and, for that matter, all New England, were so much nearer the seat of the Society than were the Southern States that where members of the Board of Directors came from the States they represented the North would invariably outnumber the South in the number of those in attendance. It is sufficient here to say that the estrangement of the South was not due altogether to economic changes in that section. The South, at least a part of it, began to lose interest in the American Colonization Society before it be-

²⁰⁰ *Ibid.*, vol. xv, p. 27.

gan to lose interest in the cause of colonization. By 1840 both Louisiana and Mississippi were seriously contemplating action independent of the American Colonization Society, and the basis of their position was that good faith to the South required it.²¹⁰ By 1843 McLain, Secretary of the parent Society, wrote:

More than half the South look upon us as a co. of abolitionists only called by another name.²¹¹ And by April, 1852, Alabama had organized a Colonization Society entirely independent of the American Colonization Society, and because there was in the minds of many an impression that the Am. Col. Society partook too much of the abolition spirit to receive their countenance and support.²¹²

Since 1830 there had arisen a great need for the incorporation of the Society. Several bequests had been lost, and some had not been made, because of the fact that the Society was not a corporate body. After one or two efforts to secure a charter of incorporation from Congress, all of which ended in failure, General Walter Jones declaring that a debate in Congress over the charter of the Society would have divided and agitated that body more than would the proposal to recharter the United States Bank,²¹³ the Maryland legislature granted it a charter in 1831.²¹⁴ This was not altogether satisfactory. During 1837 Clay made two efforts to secure in Congress a more satisfactory charter, but again it was refused. Finally, the Maryland legislature, in 1837, granted the amended charter.²¹⁵

A word more as to the finances of the Society. Of those who, in 1838, were contributors on the plan of Gerrit Smith, that is, who subscribed one hundred dollars per year for a period of ten years, two were from Maine, one from Vermont, two from Massachusetts, one from Connecticut, one from Rhode Island, five from New York, two from

²¹⁰ Letters of American Colonization Society, MS., F. Knight to Wilkeson, Aug. 1, 1840, No. 704.

²¹¹ Ibid., McLain to Dodge, Feb. 27, 1843, No. 720.

²¹² Journal of Executive Committee of American Colonization Society, MS., Apr. 16, 1852.

²¹³ The Liberator, Feb. 15, 1834.

²¹⁴ Minutes of Board of Managers of American Colonization Society, MS., Feb. 15, 1837.

²¹⁵ Ibid., Mar. 30, 1837.

New Jersey, four from Pennsylvania, one from Delaware; sixteen from Virginia, one from South Carolina, four from Mississippi, seven from Louisiana, three from Maryland, two from the District of Columbia, and one from Ohio.²¹⁶ The total expenditures of the Society to November 13, 1838, were \$379,644.15.²¹⁷ By 1839 the total debt of the Society was estimated by Wilkeson at approximately \$70,000.²¹⁸

It was not a bright day for colonization, in December, 1838; with a heavy debt, hardly an agent actively engaged in the work, a difference of opinion between the northern and southern branches of the Society as to the best means of giving it efficiency, and a North and West that had been invaded and, if not conquered, at least dumfounded by the accusations of the Abolitionists. This was enough, but this was not all. When the New York delegates went back to report they found that Society unwilling to ratify their agreement to the amended constitution. Wilkeson, who labored earnestly for the cooperation of the Pennsylvania and New York Societies wrote, in May, 1839: "A negotiation between the Emperor of Russia and the States of Holland in the sixteenth century could not be more diplomatically ceremonious than that between your two societies."²¹⁹ Difficulties were real when a man of his indomitable will admitted, "I confess I feel discouraged. . . . Can there be any organization that will unite all friends of the cause in support of the Am. Col. Society? If not, the friends of the cause ought to know it."²²⁰ But there were brighter days ahead.

²¹⁶ African Repository, vol. xiv, back cover.

²¹⁷ Letters of American Colonization Society, MS., Gales to Wilkeson, Washington, Nov. 14, 1838.

²¹⁸ Ibid., Wilkeson to Ker, Washington, July 25, 1840. No. 680.

²¹⁹ Ibid., Wilkeson to Rev. Hope, May 9, 1839.

²²⁰ Ibid., Mar. 28, 1840, no. 119.

CHAPTER III

AMERICAN COLONIZATION AND GARRISONIAN ABOLITION.

[The bitterest opposition Colonization ever encountered came from the Abolitionists of William Lloyd Garrison's school. Next to these, its fiercest enemies were the slaveholders of the Southeastern States. One who turns the pages of Garrison's *Liberator* for the years 1831 to 1835, will be struck by the fact that in some issues more space was given to tearing down the influence of the Colonization Society than was used in direct opposition to the institution of slavery.] Henry Clay told the truth when, in 1838, he said: "The roads of Colonization and Abolition lead in different directions, but they do not cross each other,"¹ but no more hostile denunciation was ever used in depicting the crimes of slaveholders than was used in characterizing the Colonizationist leaders. This is all the more surprising when the fact is known, and it is a fact, that those very Colonizationists with whom Garrison came in contact were as truly opposed to slavery as Garrison himself. Elijah Paine, one of the foremost citizens of Vermont and for years President of the State Colonization Society, was as earnest an advocate of emancipation as any Abolitionist in the North,² but *The Liberator* made no distinctions.

In the struggle for supremacy the Garrisonians took the offensive. The opposition began with them and continued until Colonization journals refused longer to take notice of Abolition speeches or articles.³ Between 1831 and 1840 the opposition often took the form of direct meetings in

¹ *African Repository*, vol. xiv, pp. 17-18.

² *Ibid.*, vol. xv, pp. 44-48.

³ *Letters of American Colonization Society*, MS., W. McLain to Hon. Edw. Storrs, December 30, 1841, No. 494; McLain to Samuel Elliott, vol. iv, No. 1425.

debate.⁴ Frequently after the debate a vote would be taken to ascertain the sentiments of the audience. When, in 1835, Gurley made a tour of New England, there was no dearth of challengers among the Garrisonians. At Boston he chanced into a session of one of their conventions and had hardly taken his seat when a Garrisonian leader arose and moved a resolution declaring the principles of the American Colonization Society to be "unrighteous, unnatural, proscriptive, and the attempt to give permanency to the institution [of slavery], a fraud on the credulity and an outrage on the intelligence of the public," and challenging any person present to defend the Society. Gurley arose, and the result was a two days' debate.⁵ Proceeding to Concord, New Hampshire, he found another convention in session, and here also he was drawn into a discussion which ended quite favorably to Colonization, if we are to judge by the subscriptions received from prominent men of the State at a meeting held a day or two later in the same city and resulting from the debate. Among the subscribers were the governor, an ex-governor, Judge Upham, and many members of the legislature.⁶ These are but illustrations of what was going on throughout the North and West between Colonization agents and radical Abolitionists.

It must not be forgotten that there were two distinct classes of Abolitionists: (1) moderates and, (2) Garrisonians. This classification was well known in the North, and the distinction is so important for our present purposes, for reference in this chapter is made almost wholly to the Garrisonians, that attention is here called to it. It will be profitable to consider briefly an important point in

⁴ *African Repository*, vol. ix, p. 218; vol. x, pp. 125-126; *Letters of American Colonization Society*, MS., Gurley to Fendall, Boston, June 1, 1835.

⁵ *Letters of American Colonization Society*, MS., Gurley to Fendall, Boston, June 1, 1835; *Minutes of Board of Managers of American Colonization Society*, MS., vol. iii, p. 190 ff.

⁶ *Minutes of Board of Managers of American Colonization Society*, MS., vol. iii, p. 193. *Letters of American Colonization Society*, MS., Gurley to Fendall, Boston, June 11, 1835.

connection with the origin of the Garrisonian group and of the Colonizationists.

Garrison founded his group upon a sectional sentiment; Colonization was founded upon a national sentiment. Garrison's sowing was of the wind and, as we shall come to see hereafter, his reaping was of the whirlwind. Colonizationists have been accused of many unworthy motives, but never yet have they been accused of ever having sown a seed of disunion and civil strife. It was born out of a desire to unite the North and the South in the settlement of the negro problem. Garrison was determined to free the slaves at once, whether or not the result was the disruption of the Union; Colonizationists were determined to forego immediate emancipation, for the sake of accomplishing both ultimate emancipation and the preservation of the Union. This is the very heart of the distinction between the creeds of Garrisonians and Colonizationists. As to ulterior aims and motives, in the origins and progress of the two organizations, the paramount aim of Garrison has been universally admitted to be the immediate and unconditional emancipation of all the slaves in the United States. The sincerity of his aims has never been seriously questioned. Unfortunately, and thanks to the vituperation of the Garrisonians themselves, the motives of the Colonizationists have been widely misrepresented since 1831. It is the purpose of this study to set forth the true aims of orthodox Colonizationists, or, from another point of view, to demonstrate that their aims were as sincerely expressed as sound policy would admit, and that, where motives were concealed, they were concealed in order to retain the good will of the slaveholder in order to secure the freedom of his slaves.

However, it is desired here chiefly to set forth and compare the methods used by the Garrisonians and the members of the American Colonization Society in their relations with each other and with the Southern slaveholders, and to set forth also the results of the methods pursued by each.

A favorite method employed by Garrison to prejudice the

North against the Colonization movement was to take speeches made by Clay, or articles written by Gurley and others and, by a process of garbling, create in the minds of readers of the Abolitionist newspapers an entirely erroneous view of the attitude of Colonizationists toward the whole subject of slavery. The Colonizationists desired to appeal to all sections of the Union. They, therefore, were careful not to alienate the sympathies of slaveholders. An important fact which Garrison either failed to appreciate or consistently ignored was that the Colonization Society desired far more earnestly to abolish slavery than it expressed in its official journal. It would have been much more difficult for him to make a plausible garbled account of its attitude, as expressed in all its official records and private correspondence—and only here could be found expressed its true attitude on that question—than to compile such an account from the *African Repository*.⁷ A striking example of the method employed is contained in Garrison's *Thoughts on African Colonization*, page 149. In an effort to prove Dr. Caldwell, one of the most active founders of the Colonization Society, a proponent of slavery, Garrison offers the following quotation:

The more you improve the condition of these people, the more you cultivate their minds, the more miserable you make them in their present state. You give them a higher relish for those privileges which they can never attain, and turn what you intend for a blessing into a curse. No, if they must remain in their present situation, keep them in the lowest state of ignorance and degradation. The nearer you bring them to the condition of brutes, the better chance do you give them of possessing their apathy.

It is true that Dr. Caldwell made the remark as quoted; but he followed it immediately, and as the expression of his own view, with the following sentiment, which Garrison omitted from his quotation:

Surely Americans ought to be the last people on earth to advocate such slavish doctrines,—to cry, peace and contentment to those

⁷ For an example of Garrison's method, see both *The Liberator* for December 8, 1832, pp. 193-194, and *African Repository*, January, 1833, pp. 346-347. See also *African Repository*, first article, March, 1833.

who are deprived of the blessings of civil liberty. Those who have so largely partaken of its blessings—who know so well how to estimate its value, ought to be foremost to extend it to others.

When Garrison was called to account for this utter perversion of the views of Dr. Caldwell, he admitted he had not read Dr. Caldwell's remarks, but, at the same time, when he should have been content with doing Caldwell, already in his grave, the justice of a frank confession of his own serious blunder, he made an effort to prove by other extracts and quotations, that he had, after all, not done that leader injustice in an estimate of his views. In the latter attempt he ingloriously failed.⁸ As a matter of fact, both Francis Scott Key and Caldwell had been active in securing the liberty of negroes in the District of Columbia taken illegally into slavery.⁹

A method similar to the above, employed by The Liberator, was that of publishing as evidence of the proslavery sentiment in the Colonization Society, divided votes at annual meetings, although these votes were expressions of policy alone, and were in no true sense an expression of the views of the organization upon the subject of slavery.¹⁰ In a number of instances, accusations made had no foundation whatever in fact.¹¹ Garrison himself, while on a tour of England in advocacy of his cause, stated that the American Colonization Society

originated with those who held a large portion of their fellow-creatures in worse than Egyptian bondage; that it was generally supported by them; and that it was under their entire control—that not one of its officers and managers had emancipated his slaves, and sent them to Liberia . . . that it maintained that no slave ought to receive his liberty, except on condition of instant banishment from the country. . . .

It was "the apologist and friend of American slaveholders."¹² These accusations are so sweeping in their scope

⁸ The Liberator, Nov. 2, 1833; Jesse Torrey, *A Portraiture of Domestic Slavery in the United States*, pp. 86-87, Philadelphia, 1817.

⁹ Torrey, pp. 49-52.

¹⁰ The Liberator, March 2, 1833; April 6, 1833; Sept. 21, 1833.

¹¹ African Repository, vol. ix, pp. 201-203; United States Telegraph, July 24, 1833.

¹² The Liberator, October 19, 1833.

that a refutation of them here would require needless repetition. But if the positions taken in this study have been successfully maintained, the motives of Colonizationists were utterly misstated by Garrison.

The columns of *The Liberator* were at times self-contradictory. For instance, the issue for September 21, 1833, contained a reprint which required for insertion the whole of the first and part of the second page; it was an account of the maltreatment of the Northerner, Rev. J. B. Pinney, whom the South Carolinians erroneously thought had come to Columbia in advocacy of Colonization. And on the next column was another reprint which contained an insinuation that the Colonizationists were in collusion with South Carolina slaveholders.

Again, there was circulated about 1839, by the Abolitionists, a so-called Authentic Narrative of James Williams, an American Slave, which set forth the cruel treatment received by southern slaves at the hands of their owners. Upon an examination into the authenticity of the Authentic Narrative, it was found that the pamphlet was a fabrication, and it was repudiated by the antislavery committee which made the investigation.¹³

During a session of the Methodist General Conference, in Baltimore, an ultra-Abolitionist delegate presented an Abolition petition containing eleven or twelve hundred signatures. When investigation was made it was found that "scores of names were signed twice, and many . . . were . . . forgeries, or declared to be so by the parties. Hundreds were ascertained to have been signed to a temperance memorial, and had been surreptitiously appended to this. Whole families . . . were subscribed, who declare they had never seen the memorial. . . ."¹⁴ Negroes returning from Liberia and bringing accounts entirely untrustworthy were employed by Garrisonians to set forth the "true" condition of affairs in Africa.¹⁵

¹³ *African Repository*, vol. xv, pp. 161-163.

¹⁴ *Ibid.*, vol. xvi, pp. 350-351.

¹⁵ Letters of American Colonization Society, MS., B. M. Palmer to Gurley, Charleston, S. C., May 26, 1834.

In 1842 an Abolitionist lecturer of Vermont assured his auditors that the Colonizationists were throwing money away, having already made away with more than one hundred million dollars since 1817. Upon protest from a clergyman who was in the audience, the lecturer assured his hearers that his statement was drawn from the official records of the Society. As a matter of fact he had overstated his figures something over ninety-nine and a half million dollars.¹⁶ An Indiana Colonization agent reported that in that State the Abolitionists were using as an argument against the Society the statement that "the men who are engaged in taking free blacks to Liberia bring back two or three slaves for every black taken out."¹⁷ Judge Samuel Wilkeson, General Agent of the Society, wrote to a Vermont Colonizationist:

The abolitionists in many parts of the country are becoming quiet. You observe that they have made some statements which you believe untrue but have not the means of correcting them. Those who control the abolition press generally are destitute or reckless of truth, making statements of which they have not the evidence of truth, or which they know to be false. For instance, Mr. Garrison published me last fall as a large slaveholder in Florida. I called on his agent and assured him that I never owned a slave, and requested him to contradict the charge, which instead of being done, the falsehood has gone the rounds of every abolition paper in the Union.¹⁸

Besides these direct misstatements of fact, the Garrisonians made sweeping assertions that are utterly incapable of proof, but which cannot be refuted except by a consideration of the whole history of the Society. Garrison charged, for instance, that the American Colonization Society "is pledged not to oppose the system of slavery"; "apologizes for slavery and slaveholders"; "is nourished by fear and selfishness"; "aims at the utter expulsion of the blacks"; "is the disparager of the free blacks"; "deceives and misleads the nation."¹⁹

When the debt of the Colonization Society was published

¹⁶ Ibid., Dr. A. Proudfit to Whittlesey, New York, September, 1842.

¹⁷ Ibid., B. T. Kavanaugh to McLain, Indianapolis, April 18, 1846.

¹⁸ Ibid., Wilkeson to J. P. Fairbanks, June 21, 1839.

¹⁹ African Repository, vol. ix, pp. 105-109.

in the February *Liberator*, 1835, that periodical was exultant, exclaiming: "MENE, MENE, TEKEL, UPHARSIN. Debt of the Handmaid of Slavery, \$46,000." In the same issue, of eight and one-half feet in columns of printed matter on the first page, all but five inches is devoted to tirades against the Society, an important part of it being made up of garbled quotations from Colonization leaders.²⁰ Cresson writes from Glasgow of C. Stuart, confederate and warm co-worker with Garrison while Stuart was in America, that the latter denounced all those who used West India sugar as "doomed to hell, with damnation for their portion."²¹ An Indiana agent reported that the Abolitionist candidate for governor of that State, who was also a member of the Indiana Supreme Court, in an attack upon Colonization spoke "in a most loose, vulgar, and abusive manner inso-much that the ladies were driven off."²² Examples of the immoderate, misleading and untrue statements of Mr. Garrison's paper are the following: "We are becoming daily more versed in the corruption of the advocates of the American Colonization Society. With all their insolence, they are dastardly." "The records of the Colonization Society are obvious exhibitions of deceitfulness." "As it is at present organized, the American Colonization Society cannot justly make any pretension to justice or mercy, with more plausibility than they could who brought the natives of Congo from their own land."²³ Commenting on the debt of the Colonization Society, the same publication exclaimed:

We have not room for all the speeches that were delivered, but the following extracts [which, by the way, were very misleading summaries of those delivered at the annual meeting] show that the Genius of Contradiction presided on the occasion, assisted by Hypocrisy, Falsehood, Desperation and Folly. The days of the Society are numbered. Glory to God in the highest!²⁴

²⁰ *Ibid.*, vol. xi, p. 57; vol. x, pp. 356-360; *The Liberator*, Feb. 22, 1834.

²¹ Letters of American Colonization Society, MS., Cresson to Gurley, Glasgow, Mar. 15, 1833.

²² *Ibid.*, Kavanaugh to McLain, Indianapolis, April 30, 1846.

²³ *The Liberator*, May 18, 1833.

²⁴ *Ibid.*, Feb. 8, 1834.

One would think that the editor would have hesitated in his sweeping characterizations, for in the same paper is contained the admission:

Were numbers necessary to the success of the Colonization Society? It has enrolled upon its list, the high and the low, the rich and the poor, all classes of people, in multitudinous gatherings and multiform varieties. Did it need the sanctity of religion? What theological institution, what religious sect, what presbytery, synod, general assembly, conference, or church, what eminent divine or deacon, what religious periodical or newspaper, has it not until recently counted approvingly on its side? Did it need political favor? It has been appropriated by all parties. . . . In short, in its ranks have stood, hand in hand, the Presbyterian and the Quaker, the Episcopalian and Baptist, the Methodist and Unitarian, the Universalist and Infidel—the freeholder and slaveholder. . . .²⁵

It seems not to have occurred to the editor that an organization which could boast of such a host of supporters was not to be condemned in terms of wanton ridicule and sarcastic vituperation.

A further method of the Garrisonians was to draw in lurid colors utterly untrustworthy pictures of slavery as a system, pictures which fired the minds of the New Englander and exasperated the Southerner, who was perfectly acquainted with the system.²⁶ On a par with these were the unqualified statements of Garrison that (1) slaveholding is in all cases sinful, (2) it should be immediately prohibited, (3) "If it were evident that only by a short delay, he could be better prepared to receive the boon of liberty, still the slave ought to be a free man *now*. . . ."²⁷

The Colonization agent had to endure not only this wholesale condemnation of the cause in which he labored but also, in many cases, personal calumny. Elliot Cresson, on a mission to England for the promotion of the Colonization cause, wrote from Edinboro:

In no place has the A[nti] S[lavery] party had recourse to more abject means of insult. . . . In these assaults, *for myself*, supported by the consciousness of my high mission, I care not; but if you do not vindicate yourselves thro' me and meet the libels of the A. S. Party, by *prompt* letters . . . the cause must suffer. Let them

²⁵ Ibid., Dec. 13, 1834.

²⁶ Ibid., May 3, 1834, p. 71.

²⁷ Ibid., March 7, 1835.

know that I enjoy your entire confidence, and that every penny received, is religiously devoted to legitimate purposes—for to check the current of benevolence, I found it whispered about that I was *without authority from you—disbursing your funds for my own purposes*, and any other means as miscreants deemed most likely to circumvent me.²⁸

Indeed, he became restive under the continued vexations to which he was subjected. He could not hear from Colonization headquarters frequently enough to keep up such a defensive as desired and, in exasperation, he asked, "How can I fight (for fight I must) if I have neither weapons or ammunition? Must I like the spider spin them out of my own unaided self?"²⁹

So reckless had the Garrisonians become in their determination to gain their ends that they resorted to the frank statement of sentiments which, but for the burning question of slavery, would have branded them for all time as traitors to their country. When the discussion between this country and Great Britain over the northeast boundary between the United States and Canada was at its height, an American negro, Redmond, who was a Garrisonian lecturer and was speaking in Scotland, openly advocated war between the United States and Great Britain, even at the risk of the defeat of his own country, and for the reason that it would bring about the emancipation of the slaves at the South.³⁰ The British Garrisonians were in accord with this view. One of their newspapers gave this exaggerated view of the slave system in America:

The horrors of the slave system, as pursued in the Southern States, are unutterable; nothing that the wildest imagination can conceive surpasses the cruelties inflicted on the wretched negro victims; and if it were in our power to stir up the spirit of the slaves to rebel against the heartless planters . . . we would use that power, though all America was thrown into disorder, and presented one wide field of bankruptcy and ruin.³¹

A contributor to Fraser's Magazine, taking his data from

²⁸ Letters of American Colonization Society, MS., Cresson to Gurley, Edinboro, Mar. 19, 1833.

²⁹ Ibid., Cresson to Gurley, Adelphi, June 6, 1833; London, October 6, 1831.

³⁰ 27th Cong., 3d sess., H. Rept. No. 283, p. 1026.

³¹ Ibid., pp. 1026-1027.

a recent publication of the American Abolitionists, urged upon the British the high moral duty to declare war against the United States, with the ultimate aim of freeing the slaves in the South. Taking the Abolitionist statements at their face value, the writer urged that America "holds nearly three millions of unoffending human creatures in the most cruel bondage; in a thralldom infinitely worse than Egyptian, Turkish, or Sclavonian. In fact, we doubt if the annals of the human race afford an example of any system of oppression at all approaching to that which is proved . . . to exist in America." The dissolution of the Union was, then, highly desirable, both for the security of Great Britain's possessions and for the abolition of slavery in the United States. Immediately upon the declaration of such a war, if it were made clear that it was to be prosecuted as a war for emancipation, the free blacks of Jamaica would lend their aid at once. "In one morning a force of ten thousand men might be raised in this quarter. . . . In three weeks . . . the entire south would be in one conflagration."²¹

The North Carolina Quaker, Jeremiah Hubbard, who was willing to go as far as any man in a rational program for the abolition of slavery, made these observations upon Garrisonian methods:

I would give thee a little specimen of his style and manner of writing; in his opinion of the Colonization Society, he says:—"The superstructure of the Colonization Society rests upon the following pillars. 1. Persecution. 2. Falsehood. 3. Cowardice. 4. Infidelity. If I do not prove the Colonization Society to be a creature, *without heart, without brains, eyeless, unnatural, hypocritical, relentless, unjust, then nothing is capable of demonstration!!!*" His language to slaveholders, or of slaveholders is, "They are hypocrites, man-stealers; and such as hold offices in the United States," he says, "are guilty of corrupt perjury, and unless they repent, will have their part in the lake that burns with fire and brimstone." This kind of language is not at all calculated to make good impressions on the minds of slaveholders, even of those of whom it may be true, and it is utterly false as respects many who hold slaves—they would be very glad to have it in their power to put their slaves in a better situation. . . .²²

²¹ Fraser's Magazine, London, April, 1841, pp. 494-502.

²² African Repository, vol. x, p. 37 ff.

Hubbard was Clerk of the yearly meeting of Friends of North Carolina, a member of both the Colonization Society and an Abolition Society, though not of Garrison's school, a leader among a group of seven or eight thousand Quakers of North Carolina, who had contributed thousands of dollars toward the Colonization Society, had fought slavery for upwards of fifty years, had for forty years repeatedly memorialized the legislature for permission to conscientious slaveholders to manumit their slaves, had assisted about one thousand slaves to seek their liberty in a free State. And Hubbard's comment is: "After all this, by the above positive denunciation we are indirectly assailed by the colonization persecutors as liars, cowards, infidels, without heart, without brains, eyeless, unnatural, hypocritical, unjust. Such language, my brethren, is not calculated to conquer enemies, gain friends, soften hard hearts, or convince infidels, even if it were true."⁸⁴

The fierceness and boldness of these Abolitionist attacks were not without tremendous effect. Some of the most consistent Colonizationists of New England were startled by their "revelations." Ezra S. Gannet was one of this class. He had read statements made in Boston by Thomas C. Brown, a former colonist who, having become disgruntled because of the failure, up to this time, of the Colonization Society to pay a claim held against them for lumber that Brown had shipped,⁸⁵ had been employed as a Garrisonian lecturer to "inform" the New Englanders of conditions in Liberia and of the attitude of Colonizationists toward slavery. Gannet was wise enough to write to Colonization headquarters for their statement of the facts about which Brown had spoken.⁸⁶ The reply was satisfactory and Gannet continued his relations with the Colonizationists.⁸⁷ In his reply, he refers to the "most unmerited and

⁸⁴ *Ibid.*, vol. x, pp. 214-215.

⁸⁵ Letters of American Colonization Society, MS., Grimke to Gurley, 1854.

⁸⁶ *Ibid.*, Gannet to Gurley, Boston, June 19, 1834.

⁸⁷ *Ibid.*, Nov. 12, 1834.

shameful abuse from violent Anti-Slavery" writers, to which the Society and its agents had been subjected, and of the "extravagance and intemperance of Mr. Garrison." The anti-slavery agitator, Dr. Thomas Hodgkin, of London, wrote to the American delegates to the Anti-Slavery Convention held in that city in 1840: "I admit that you have completely succeeded in drawing a repulsive picture of the Society, but I do not admit that it gives a fair idea of the reality."³⁸

A group of Colonizationist students from Western Reserve College wrote Gurley in 1832 of the effect The Liberator had already had in the College before Garrison had been publishing it two years. Before its appearance upon the reading tables of that institution the student body had expressed no doubt of the sincerity of the Colonization movement. By 1832 not only students but the faculty were enlisted in two opposing groups. One group wrote:

We had always supposed . . . that the Colonization Society was friendly to human rights, was the avowed enemy of slavery, an uncompromising foe of the oppressor; and that its ultimate *design* and *tendency* was to free the captive. . . . We had supposed these to be its claims, and that these were incontrovertible. But they are flatly denied in this same land of Ohio, and the institution denounced, as wanting even the common sanction of benevolent design!³⁹

It was thus throughout New England and the West. If Garrison caught the ear of some of the most prominent men of those sections of the Union, it is not difficult to picture the effect his clear cut, unmistakable charges had upon the minds of those who accepted without deep reflection the sentiments they heard or read upon a topic so absorbing as that of negro slavery. From Portland, Maine, the report from the Colonizationist agent came, that "a prodigious current turned after" Garrison.⁴⁰ The Secretary of the Society, after a

³⁸ African Repository, vol. xvi, pp. 311-313.

³⁹ Letters of American Colonization Society, MS., Students of Western Reserve College, Hudson, Ohio, to Gurley, October 29, 1832.

⁴⁰ Ibid., Cummings to J. N. Danforth, Portland, Maine, February 14, 1832.

tour of New England during the summer of 1834, reported evidences of a distinct change of sentiment in New England unfavorable to the Society. Coming as it does from him, the following statement is not without value, as showing the view taken by Gurley of the motives and hopes of Colonizationists. He says:

Yet in the light of clearest evidence, that the American Colonization Society was designed and has been sustained with the view of affording means and motives for the voluntary, peaceful and entire abolition of slavery; that its moral influence favorable to emancipation, has been and is operating most extensively and powerfully at the South, the anti-slavery men of the North denounce it as the friend and ally of slavery, and attempt its overthrow with more zeal and effort, if possible, than even that of slavery itself. Because the friends of colonization are indisposed to pursue a course which must, in their opinion, put in imminent jeopardy the peace and safety of a large portion of the country, endanger the security and even the very existence of the Federal Government, because they believe that the consent of the South is indispensable to any plan for the abolition of slavery, they are denounced as enemies to the colored race and to the cause of Liberty.⁴¹

There is a good deal of the prophetic in this utterance.

If there was any distinctive feature of William Lloyd Garrison's efforts from 1831 to 1839, it was the alienation of New England and the West from the spirit of cooperation with the South, in the effort to get rid of slavery, to the spirit of antagonism against the South, in the effort to force that section to abolish slavery. If the methods of Garrison during those years had any inevitable result, it was that of replacing nationalism by sectionalism. A generation had not passed away before the surmises of Gurley had become regrettable fact. Eight years after the tour upon which comment has just been made, he was in New England again; and this time he found churches closed against him and all those who worked with him; he found the New England public apathetic toward the essentially national efforts of his Society; he found the clergy either cowed into silence by the pronounced views of their congregations or else themselves victims of the adroit, if unscrupulous, lecturers, editors, and agitators who visited every

⁴¹ *African Repository*, vol. x, pp. 129-139.

New England and Western town.⁴³ By 1840 Garrison had accomplished very well one thing—the consolidation of New England and the then Northwest in an aggressive sectionalism. Those individuals from the North who had visited the South, or who had resided there, understood that the denunciations of Garrison were based upon a picture of a system of slavery that, as a system, had no existence save in the mind of that leader.⁴³ But, unfortunately, those were not the days of railroad and telegraph lines, and Garrison and the masses whom he influenced knew little of the real system of slavery that existed in the South.⁴⁴

Public opinion unified and sectional passion excited, the next step in the program of the Garrisonians was to enter politics. Hereafter the fitness of a candidate was to be judged by his agreement or disagreement with their views on the subject of slavery. This step had been reached before the end of the thirties.⁴⁵ It was the most dangerous step Abolitionists ever took. It is always dangerous for any considerable section to test the fitness of those political leaders who sit as the nation's lawmakers by their position upon any issue that is essentially sectional. By 1840 the New Hampshire Garrisonians had so far developed their scheme of coercion as to determine to unsettle all clergymen in the State who would not subscribe to their views.⁴⁶ If we will remember that the mass of the people of New England knew little of the system of slavery as it actually existed at the South, and also that it was these same people who elected or refused to elect those candidates and those clergymen who offered their services to the State and to the Church, we shall better understand why the very leaders

⁴³ Journal of Executive Committee of American Colonization Society, MS., Nov. 25, 1842, pp. 294-307; Letters of American Colonization Society, MS., Danforth to Gurley, December 21, 1832; S. M. Worcester to Gurley, Amherst College, November 5, 1834.

⁴³ Ibid., G. D. Abbot to Gurley, New York, Jan. 15, 1833.

⁴⁴ Ibid., Amos A. Phelps, Andover Theological Seminary, Jan. 15, 1828.

⁴⁵ African Repository, vol. xv, p. 19 ff.

⁴⁶ Letters of American Colonization Society, MS., Prof. O. P. Hubbard to Wilkeson, Dartmouth College, May 5, 1840.

in New England thought were anti-Garrisonians in 1832, while, in 1840, many of them had gone over to that faith.

It must not be supposed that William Lloyd Garrison and *The Liberator*, alone, conquered the Colonization spirit of New England and the Northwest. There were other speakers and other papers, many of them. It seems that at the Granville, Ohio, postoffice in 1836, there were being taken, or were sent, more than three hundred Abolition publications and only one publication of the Colonizationists.⁴⁷ The President of the Granville Colonization Society wrote that of six hundred and ninety periodicals, religious, scientific, professional, and Abolition, emanating from one hundred and twenty presses, there was but one copy of the *African Repository* and no other Colonization paper taken; also, that "Anti-Slavery lecturers have for several years past visited us every few weeks or months; sometimes remaining a week or two and lecturing as often as they could collect a congregation."⁴⁸ Gurley in 1842 estimated the proportion of Colonization to Abolition lecturers to be about one to one hundred.⁴⁹ At any rate, there had come over some prominent Colonizationists a radical change of sentiment, and some Colonization leaders became such opponents of the Society as to out-Garrison Garrison.

One of these was Arthur Tappan who, by 1833, came to the opinion that "The Colonization Society is a device of Satan and owes its existence to the single motive to perpetuate slavery."⁵⁰ And Gerrit Smith, who had given thousands of dollars to the Society and had expressed his displeasure with the methods of Garrison, was a radical of the radicals by 1838. He had been asked to contribute to the erection of a Methodist Church in New Orleans. He refused to do so, and stated his reason as follows:

Suppose I were invited to contribute to the cost of erecting a heathen temple, could I innocently comply with the request? . . .

⁴⁷ Ibid., Seven Wright to Gales, Granville, Ohio, March 23, 1836.

⁴⁸ Ibid., W. S. Richards to Gurley, Granville, Ohio, March 28, 1838.

⁴⁹ Ibid., Gurley to R. S. Finley, Dec. 14, 1842, No. 489.

⁵⁰ Ibid., Tappan to Gurley, New York, June 26, 1833.

Now, I take it for granted, that the Religion which is to be preached in the "place of worship" which you invite me to assist in preparing is the Religion of the South; and I put it to your candor, whether it is not, therefore, fairly to be considered as an idolatrous "place of worship."⁵¹

Besides the direct attacks made by the Garrisonians upon the Colonization Society and those who were interested in it, that party worked indirectly but very effectively to the prejudice of Colonization by discouraging the blacks from offering to emigrate to the colony. The word "emigration" was replaced by the words "banishment," "expatriation," and so on. Although the records have been examined, not a single case of involuntary exportation has been revealed; but the use of those terms kept many a negro from offering to go to Liberia. The free blacks, who at one time hailed with delight the opportunity of returning to the land of their fathers, began to adopt resolutions in opposition to the Society, and after the thirties there was a marked indisposition among them to emigrate to the colony.⁵²

In the South probably the most effective argument against the Colonization Society was that it was but a form of Abolitionism; in the North and Northwest, that its purpose was to "rivet the chains of the slave." The persistence of those who used these contradictory arguments ought to be well nigh conclusive of the motives of Colonizationists. But hitherto it has never been so.⁵³ Henry Clay expressed the position of the Society when he said: "Both objections cannot be founded in truth. Neither is."⁵⁴ The proslavery

⁵¹ *African Repository*, vol. xiv, pp. 48-49.

⁵² Carey, p. 2; Letters of American Colonization Society, MS., Burr to Gurley, Richmond, Va., January 27, 1834; *African Repository*, vol. xvi, p. 114; Speech of Edward Everett at Anniversary of American Colonization Society, January 18, 1853; Manuscript Division, Library of Congress, Massachusetts Broad-sides, 24th Anti-Slavery Bazaar.

⁵³ *African Repository*, vol. i, pp. 341-343; vol. vi, p. 1 ff.; vol. ix, pp. 228-229; vol. xii, p. 298; vol. xiv, pp. 17-18; vol. xix, p. 152.

⁵⁴ No more complete refutation of the charges of the Abolitionists, who declared that the Colonization Society forged the chains of the slaves, can be given than the following references to private letters written by leading agents of the Society. They contain what ought to be a final answer to those who made, or continue to make, those charges. Letters of American Colonization Society, MS., Bir-

slaveholders, and it is a pity Garrison could not realize that there were actually antislavery slaveholders in the South, ought to have understood that an organization that was as persistently opposed by the Abolitionists as was the Colonization Society, could not be considered an advocate of a general and immediate abolition of slavery; and the Abolitionists ought to have understood that an organization that, in 1832, could not maintain an agency in either Georgia or South Carolina, was hardly to be convicted of collusion with slaveholders.⁵⁵

Colonizationists believed that a general, immediate, and unconditional emancipation of all the slaves in the Union was impracticable and undesirable: impracticable (1) because there was no constitutional right of the federal government to enact a general emancipation provision, (2) because the States alone having the right to pass emancipation measures would do so only as the public sentiment of each slave State became favorable to emancipation, (3) because public sentiment in the slave States was not yet favorable; undesirable (1) because it was believed that three millions of negro slaves set free at one time would be unable to care

ney to Gurley, Huntsville, Alabama, July 12, 1832; Mechlin to Gurley, Liberia, February 28, 1833; Cresson to Gurley, Mar. 15, 1833; Danforth to Gurley, Boston, December 28, 1832; J. H. Cocke to Gurley, Norfolk, January 14, 1833; Gallaudet to Gurley, Hartford, March 24, 1833; Finley-Birney to Gurley, New Orleans, April 13, 1833; Gurley to Fendall, Boston, August 3, 1835; T. B. Balch to Wilkeson, Locust Hill, October 11, 1839; Balch to Wilkeson, New Baltimore, November 20, 1839; J. D. Mitchell to Cresson, Liberty, December 28, 1839; Henkle (see Cresson to Wilkeson), February 27, 1840; Ker (see Cresson to Wilkeson), Miss., March 12, 1840; W. McKenney to Wilkeson, Greensboro, N. C., November 6, 1840; Mrs. M. B. Blackford to Gurley, Va., January 28, 1843; C. W. Andrews to McLain, Virginia, Mar. 27, 1843; Tracy to Gurley, Boston, May 8, 1843; Pinney to McLain, April 5, 1845; D. L. Carroll to McLain, New York, July 5, 1845.

No effort has been made to continue these references beyond the year 1845, for it is believed that there is no doubt about the position of the Colonization Society after that time. Nor is the above a complete list. It is deemed, however, sufficient to set forth the true view of the Society on the subject of slavery.

⁵⁵ Minutes of Board of Managers of American Colonization Society, MS., March 7, 1832; March 12, 1832; March 26, 1832; April 9, 1832; July 11, 1832.

for themselves, and would be more wretched than under a system of slavery, (2) because the so-called free negro was not in any true sense free, and it was believed would not become really free until he was taken back to his native country and there, under the supervision of sympathetic governors, was taught self-sustenance and self-government, (3) because of the danger of a race war in the States of the lower South. They recognized slavery to be an evil. The remedy for it they believed to be gradual emancipation, made practicable through (1) cooperation between the different sections of the Union, (2) the education of slaveholders, (3) and the transportation of those manumitted or emancipated. They hoped and believed that such States as Maryland, Virginia, Kentucky, and Tennessee would enact general emancipation measures within a period of time not very remote, and that with these States free, the rest would follow, as the success of emancipation and transportation combined was demonstrated. They hoped to exert a powerful *moral* influence in favor of emancipation, but were opposed to the use of *illegal* means or means whose result might be to involve the sections in civil war, or bring about the dissolution of the Union. The gradual abolition of slavery was not to be an incidental object of the Society. It was to be one of the two direct, distinct, and primary objects: (1) to give real freedom to the nominally free American negro, by returning him to his native land and there encouraging his highest development, (2) to exert the most powerful *moral* pressure consistent with national peace and unity in favor of an emancipation as rapid as practicable, and both universal and absolute.⁵⁶

From its origin, the Society used with eagerness every opportunity to secure the liberation of slaves by offering to transport them to the colony, unless the condition of its treasury was such that it could not afford the expenditure.

⁵⁶ African Repository, vol. vii, pp. 49, 176, 200-201, 314; vol. ix, pp. 228-229; vol. x, p. 148; vol. ix, pp. 188-189; vol. i, pp. 15-16; Letters of American Colonization Society, MS., Ker to Gurley, New Orleans, April 2, 1832; East Attleborough, December 24, 1831.

When slaveholders wrote for advice as to the disposition of their slaves, as they often did, the Society consistently advised the emancipation of those in bondage, unless the case involved some peculiar circumstance. There has been found on the records of the Society no instance in which the organization ever assisted a slaveholder to retain the possession of slaves whose right to liberty was called into question. There are a number of instances in which the Society intervened in suits to secure the liberty of slaves, the total number involved running up into the hundreds. After 1839 the organization became almost aggressively anti-slavery. Abandoning its former position—the use of moral suasion to bring about gradual emancipation—it became, in many respects, a moderate abolition society. During this latter period it would send throughout the land reports on the number of slaves offered to it, on condition that it would transport them, and would directly appeal for funds to secure the liberation of the negroes. It is believed that this is a fair statement of its position on the subject of slavery. If so, it will be seen that the Garrisonians did great injustice to the whole movement and the leaders engaged in it.

The fundamental difference between the Garrisonian and the Colonizationist was this: the Garrisonians approached their task from the point of view of the eradication of an evil; the Colonizationists, from the point of view of the solution of a problem. Of the three phases of the question, the practicability, the desirability, and the method of the immediate liberation of the slave, the Garrisonian assumed the first two and considered only the third a problem; the colonizationist recognized a problem in all three. To the Colonizationist, the difference between gradual emancipation and immediate emancipation was not equal to the calamity of the dissolution of the Union, or an American civil war, or both. To the Garrisonian, the difference was worth that much. The Colonizationist chose rather to delay the day of complete emancipation than to live to see the

day of the division, probably a bloody division, of the Union. The Garrisonian chose the dissolution of the Union rather than the delay of a general emancipation.

Whatever difficulty present day writers on the Abolitionist movement have in explaining the denial of Lincoln that he was a member of that party, or, whatever difficulty they may have in explaining his preference for Colonization, they may see, from this point of view, that, taken for granted his paramount consideration of the Union and its preservation, the only logical position he could take was that taken by Colonizationists. Lincoln undoubtedly opposed negro slavery, but the evidence seems conclusive that he emancipated the slaves, not out of his hatred of slavery, but out of his love for the Union. He stated very clearly his position in the following words:

I would save the Union. I would save it the shortest way under the Constitution. The sooner the National authority can be restored, the nearer the Union will be "the Union as it was." If there be those who would not save the Union unless they could at the same time save slavery, I do not agree with them. If there be those who would not save the Union unless they could at the same time destroy slavery, I do not agree with them. My paramount object in this struggle is to save the Union and is not either to save or to destroy slavery. If I could save the Union without freeing any slave, I would do it; and if I could save it by freeing all the slaves, I would do it; and if I could save it by freeing some and leaving others alone, I would also do that. What I do about slavery and the colored race, I do because I believe it helps to save the Union; and what I forbear, I forbear because I do not believe it would help to save the Union.⁵⁷

The preservation of the Union was his paramount consideration; the emancipation of slaves was an important consideration, but nevertheless, it was a secondary consideration. He would have sacrificed immediate emancipation for the sake of preserving the Union. The Garrisonians would have sacrificed the Union for the sake of immediate emancipation. In short, Lincoln's position was precisely that of the Colonizationists and precisely the opposite of that of the Garrisonians. If Garrison's influence in bringing about the

⁵⁷ J. F. Rhodes, *History of the United States from 1850-1877*, vol. iv, p. 74.

Proclamation of Emancipation were not overestimated, and if his influence in bringing about the American Civil War were not underestimated, he would be given a more just, if not a more exalted, place in American history.

A well known historical writer assures us, in reference to anti-slavery leaders, that "it must not be supposed that . . . even the agitators realized that slavery had the latent power of dividing the Union and bringing about civil war."⁵⁸ This statement, it seems, is at variance with the facts. Between 1831 and 1845 they were so frequently and so earnestly warned of the logical consequences of their course, by patriots who represented every section of the Union, that those who neglected those warnings must be charged with either ignorance or indifference. If they did not see, it was because they had closed their eyes to the light. When Harrison Gray Otis of Boston spoke in Faneuil Hall, in 1835, he said:

Now, sir, if it were the object of our meeting here to debate the expediency of taking measures for the abolition of slavery, I would regard it as identical with the question of the expediency of dissolving the Union. I am sure it would be so considered by the Southern States. My conviction results from forty years acquaintance with prominent individuals of those States, of all parties, and in all the vicissitudes of party. Be assured that whenever that question shall be agitated in our public assemblies, under circumstances which should indicate the prevalence or the probability of a general sentiment in the free States in favor of acting upon that subject, the Union will be at an end. They would regard all measures emanating from such a sentiment as war in disguise upon their lives, their property, their rights and institutions, an outrage upon their pride and honor, and the faith of contracts—menacing the purity of their women, the safety of their children, the comfort of their homes and their hearths, and, in a word, all that a man holds dear. In these opinions they might be mistaken, but in support of them they would exhibit a spectacle of unanimity unparalleled among so numerous a population upon any subject, at any time, in any part of the world.⁵⁹

"Every effort," said he, "intended to propagate a general sentiment favorable to the immediate abolition of slavery, is of forbidding aspect and ruinous tendency." "I witnessed the adoption of the Constitution, and through a long

⁵⁸ Hart, *Slavery and Abolition*, p. 3.

⁵⁹ *African Repository*, vol. xi, pp. 311-318.

series of years, have been accustomed to rely upon an adherence to it as the foundation of all my hopes for posterity. It is threatened, I think, with the most portentous danger that has yet arisen."

Judge William Halsey of New Jersey expressed his view of the results of abolitionism:

It is time for the friends of Colonization to come out and . . . shew the extremely dangerous tendency of their proceedings and oppose by every means *except force*, mobs, and lynch laws. The situation of things requires the serious consideration of the friends of the harmony and integrity of the Union. We appear to be asleep upon a volcano, insensible of our danger. It may soon burst forth and spread desolation throughout our land.⁶⁰

The general agent of the Colonization Society for Massachusetts wrote of the doctrines of the ultra-Abolitionists:

It was seen by some from the beginning that the leaders of that society were propagating a deep and refined metaphysical system, which must naturally end in the "no-human-government theory"; in the doctrine that not only slavery, but the state, the church, and even the legal relations of husbands and wives, parents and children, ought to be abolished.⁶¹

In a debate in the Senate in 1839 Henry Clay declared that the ultra-Abolitionists were resolved to persevere at all hazards and without regard to consequences, however calamitous. Continuing, he said:

With them, the rights of property are nothing; the deficiency of the powers of the General Government is nothing; the acknowledged and incontestible powers of the States are nothing; civil war, a dissolution of the Union, and the overthrow of a government in which are concentrated the fondest hopes of the civilized world, are nothing. A single idea has taken possession of their minds, and onward they pursue it, overlooking all barriers, reckless and regardless of all consequences. . . . Utterly destitute of constitutional or other rightful power, living in totally distinct communities as alien to the communities in which the subject on which they would operate resides, so far as concerns political power over that subject, as if they lived in Africa or Asia, they nevertheless promulgate to the world their purpose to be to manumit forthwith, . . . and without moral preparation, three millions of negro slaves, under jurisdictions altogether separated from those under which they live. . . . Does any considerate man believe it to be possible to effect such an object without convulsion, revolution, and bloodshed? . . . The abolitionists, let me suppose, succeed in their present aim of uniting the

⁶⁰ Letters of American Colonization Society, MS., Halsey to Wilkeson, Newark, January 12, 1841.

⁶¹ African Repository, vol. xviii, pp. 369-376.

inhabitants of the free States as one man, against the inhabitants of the slave States. Union on the one side will beget union on the other. And this process of reciprocal consolidation will be attended with all the violent prejudices, embittered passions, and implacable animosities which ever degraded or deformed human nature. A virtual dissolution of the Union will have taken place, whilst the forms of its existence remain. . . . One section will stand in menacing and hostile array against the other. The collision of opinion will be quickly followed by a clash of arms. I will not attempt to describe scenes which now happily lie concealed from our view.⁶²

In Ohio, Elisha Whittlesey in 1839 openly charged the Abolitionists with views hostile to the Union, "as well from the tendency of their measures, as from a sermon preached last year at Braintree, Massachusetts, that went the rounds, as canonical; in which a separation of the Union is hailed as the most happy of all events."⁶³ In 1833 C. F. Mercer, of Virginia, gave this challenge to the Abolitionists:

Let those who oppose the colonization of Africa, by our colored population, because it is not a scheme for the immediate abolition of slavery in America, justify, if they can, to God and man, their hostility to a plan of enlarged policy, as well as of expanded benevolence and piety, because it does not propose to accomplish *all* that they desire, and because they desire to do that which if accomplished, *as they propose, would prostrate the fair fabric of our Union, and with it the hopes of freedom to man.*⁶⁴

James Garland, of Virginia, said of the effects of Garrisonian abolitionism: "Week by week, day by day, and hour by hour, they are creating among your youth feelings of strong prejudice and hostility to the institutions of the South," and he stated in unmistakable terms that aggressive action from the North would be met with a definite, united opposition from the South.⁶⁵ John Tyler in 1838 said: "Philanthropy, when separated from policy, is the most dangerous agent in human affairs. It is no way distinguishable from fanaticism." Of that form of philanthropy called abolition, he says: "It would pull down the pillars of the constitution, and even now shakes them most terribly. . . ."⁶⁶

⁶² Ibid., vol. xv, p. 50 ff.

⁶³ Letters of American Colonization Society, MS., Whittlesey to Wilkeson, Canfield, Ohio, November 27, 1839.

⁶⁴ African Repository, vol. ix, pp. 265-267.

⁶⁵ Ibid., vol. xiv, pp. 43-47.

⁶⁶ 27th Cong., 3d sess., H. Rept. No. 283, p. 961.

The secretary of the Colonization Society saw clearly the tendency of Garrisonian Abolition, and he deplored the rashness which prompted it. Nowhere is the real unionist spirit of the Society better set forth than in his letters written to its Managers. He traveled and knew sentiment in every part of the Union; and he writes from New York, in 1834:

For one, I feel that an awful crisis is fast coming upon the country and that the slave question is to shake the Union. . . . If the mild principles of our Society can [?] in the public mind, all will be safe. But if the pulpit and press of the North is to be enlisted in the cause of instant unconditional Abolition, the whole land will be filled with violence. The signs of the times are portentous.⁶⁷

The next summer he wrote from Boston:

That the centre of the nation is to be *deeply moved and speedily on the subject of slavery is certain*. At the next Congress, we should, . . . make a powerful and earnest appeal to the General Government. *Nothing can be lost by such a measure—everything may be gained*—the preservation of the Union, a gradual, cautious, plan of voluntary emancipation, and the regeneration of Africa. Should the doctrines and measures of the Abolitionists predominate in the non-slaveholding States, disunion, if not a general servile war will follow.⁶⁸

The plain unvarnished fact is that William Lloyd Garrison was woefully deficient in his love for the American Union. To produce conclusive evidence of this, it is only necessary to quote three resolutions offered by him at a meeting of the Essex (Massachusetts) Anti-Slavery Society, in 1842:

Resolved, That the American Union is and ever has been since the adoption of the Constitution, a rope of sand—a fanciful non-entity—a mere piece of parchment—"a rhetorical flourish and splendid absurdity"—and a concentration of the physical force of the nation to destroy liberty, and uphold slavery.

Resolved, That the safety, prosperity, and perpetuity of the non-slaveholding States require that their connection be immediately dissolved with the slaveholding States in form, as it is now in fact.

Resolved, That the petition presented to the U. S. House of Representatives, by John Q. Adams, from sundry inhabitants of Haverhill, in this county, praying Congress to take measures for a peaceful dissolution of the Union, meets our deliberate and cordial approval.⁶⁹

⁶⁷ Letters of American Colonization Society, MS., Gurley to Gales, New York, April 17, 1834.

⁶⁸ Ibid., Gurley to Fendall, Boston, August 3, 1835; Gurley to Gales, Portland, September 18, 1835.

⁶⁹ African Repository, June, 1842, vol. xviii, p. 189.

If the antislavery agitators did not realize "that slavery had the latent power of dividing the Union and bringing about civil war," it was not for lack of warning from the sanest statesmen of the time.

If the spirit of Garrisonianism was the spirit of disunion, the spirit of Colonization was the spirit of national unity.⁷⁰ Garrison's attempt to "prick the consciences" of slaveholders ended by hardening, rather than "pricking" them, and the result was sectional bitterness. Garrison broke the bonds of Union; Colonizationists attempted to heal them. The tendency of Abolition was to pull to pieces; the tendency of Colonization was to bind together. The Garrisonians believed in antagonism; the Colonizationists believed in cooperation. The Abolitionist slandered; the Colonizationist sympathized. When the slaveholder passed by, the Abolitionist pointed the finger of scorn at him; the Colonizationist called him brother, and sought to help him solve his problem—the negro problem. The Abolitionist exclaimed, "You must"; the Colonizationist said, "Let's see if we can." The most important unofficial organization in making the Civil War irrepressible, if it was irrepressible, was ultra-Abolitionism; the most important unofficial organization in trying to bring about a peaceable settlement of the negro problem was the Colonization Society.

It must not be forgotten that Garrisonians were attempting—or, what was the same, so far as the alienation of the South was concerned, forced the South to the belief that they were attempting—to do a thing that was in plain violation of the federal Constitution. The most eminent constitutional lawyers in the United States agreed that the federal government had no power to interfere with the institution of slavery in those States in which it existed. Daniel Webster's view was as follows:

⁷⁰ Ibid., vol. i, p. 225; Nov., 1832, p. 275; Minutes of Board of Managers of American Colonization Society, MS., November 20, 1835, p. 197; Letters of American Colonization Society, MS., Wilkeson to Rev. A. Yates, March 31, 1840, No. 141.

In my opinion, the domestic slavery of the Southern States is a subject within the exclusive control of the States themselves; and this, I am sure, is the opinion of the whole North. Congress has no right to interfere in the emancipation of slaves, or in the treatment of them in any of the States.⁷¹

We have already seen that Clay's views coincided with that of Webster. Harrison Gray Otis was convinced that the Garrisonians were attempting to ignore the limitations of that instrument.⁷² Even the constitution of the American Anti-Slavery Society contained the admission "that each State in which slavery exists has by the Constitution of the United States the exclusive right to legislate in regard to its abolition in said State."⁷³ And when it was proposed in the New York Anti-Slavery Convention in 1838 to eliminate a clause of its constitution similar to that just quoted, both Judge William Jay and Wendall Phillips opposed the elimination. Jay asked: "Is there a sane person in this assembly, who does not in his heart believe that . . . a law [a general abolition law] passed by Congress, instead of breaking the fetters of the slave, would instantly dissolve the bands of this Union? The South would not and ought not to submit to a usurpation so flagrant and profligate."⁷⁴ And yet, it was just such attempts as this that led Southerners to distrust the movements of their opponents.

To Colonizationists it seemed worse than useless, it seemed the height of folly, to make constant and consistent use of slander and abuse in the attempt to bring about emancipation in the South, which could constitutionally be brought about only with the consent and by the action of the slave States themselves. The Colonizationists were right. The difference between the policy pursued by the Abolitionists and that pursued by the Colonizationists was the difference between the inevitableness of a civil war, before a general emancipation, and the improbability of such a war, before a general emancipation.

⁷¹ *African Repository*, vol. ix, pp. 188-189.

⁷² *Ibid.*, vol. xi, pp. 311-318.

⁷³ *Ibid.*, vol. xiv, p. 173.

⁷⁴ *Ibid.*, vol. xiv, p. 182 ff.

The essential mistake the Garrisonians made was in assuming that every slaveholder was a slaveholder from choice, and therefore, might be justly called a "manstealer," "liar," etc. *ad infinitum*. For instance, the Garrisonian denunciation was applicable to Mrs. Dabney Minor, of Virginia, who bought two negro slaves for the express purpose of freeing them and sending them to Liberia.⁷⁵ Mrs. Mary B. Blackford, also of Virginia, in her private letters to the Society frequently lamented the existence of the institution in her State. "From childhood I have bewailed the unnumbered ills of slavery. This (the Colonization Society) is the only plan at all practicable, of lessening, or removing them, and fervent is the love and gratitude I feel, to those who like you do much for this great cause."⁷⁶ She was pained to read in the Garrisonian periodicals wholesale denunciation, for she knew that many persons at the South "make the most noble sacrifices for the benefit of the negro."⁷⁷

The *Liberator's* blanket invective was applicable also to Mrs. Ann R. Page, of Virginia—than whom not a purer or a nobler spirit lived in the whole of New England—and yet, a slaveholder! This combination was incomprehensible to the Garrisonian. Ergo, Mrs. Page was a "hypocrite," a "manstealer," a "liar,"—in short, was doomed to everlasting punishment. And yet, Mrs. Page almost wore her life away in anxiety over the welfare of her negroes. Day after day, for years, she gathered them together each morning and prayers were offered, scripture read, and they were urged to lead such lives as their mistress hoped for them. The expense involved in keeping them as she thought they should be kept brought on the estate a large debt. In the midst of her perplexities her husband died and, by the laws

⁷⁵ Letters of American Colonization Society, MS., W. S. White to Gurley, Charlottesville, Va., April 7, 1839.

⁷⁶ *Ibid.*, M. B. Blackford to Gurley, Fredericksburg, Va., September 18, 1840.

⁷⁷ *Ibid.*, M. B. Blackford, Fredericksburg, Va., September 18, 1840.

of the State, the slaves had to be sold—one of the greatest trials of her life was to see the law take its course in this instance. Of her slaves she said:

My purpose respecting these people I hold to be so sacred that I desire not, and even fear to counsel with my dearest and wisest friends, because they would all advise me to relieve myself from this bondage in which I outwardly live, and which, in their kindness for me, they have thought would ere now have ended my days. . . . I come to *Thee*, and look up through the blood of the Covenant for direction in all the affairs of this estate. And with regard to the frequent failures of some of these people in duty, let me not be put off by these things, from my settled purpose of doing them good.

When the day for the forced sale came, she retired to her room, dreading the probability that a number of the slaves would be purchased by the slavedealers present and sent to the States at the Southwest. Against this she prayed; and when the sale was over, it was found that although more than one hundred had been sold (many still remained unsold) not one had fallen into those dreaded hands. The negroes were all to remain near their former home. If this were the place, it would be a pleasant task to go further into the story of the life of this exalted character, whose treatment of her "people" was known throughout the entire State, and whose life would have been a benediction to any community in which she lived—even a community composed entirely of Garrisonians!⁷⁸

Taken baldly, as stated by Garrison, his unmeasured words were applicable also to General John H. Cocke, of Brems, Virginia, whose hesitation about sending his negroes, those who were willing to go, to Liberia arose, not from his unwillingness to be rid of slaves but from his conviction that they were not able to care for themselves. At last he found among them a valuable man, a stone mason, a man of good moral character and who gave promise of doing well for his family and for the colony. For six months before the slave expressed his willingness to leave Brems, his liberty had been at his option. With him were

⁷⁸ Ibid., Mrs. A. R. Page to Gurley, Milwood, Va., March 26, 1831; *African Repository*, vol. xx, pp. 298-305.

to go his wife and six children.⁷⁹ While the head of the house was interested in the colonization of his blacks, the mistress, no matter how many visitors had come to enjoy her hospitality, every day gathered the children of her "people" for instruction, while a pastor was employed to give religious instruction to their parents.⁸⁰ Finally, the all-inclusive character of Garrison's criticism covered the case of Miss Mary C. Moore, of North Carolina, who was not only willing but anxious to liberate her eight or ten negroes and pay the expense of their transportation to Liberia, although her needle was her only means of support when the slaves were gone. A citizen of her community, who was unwilling to see her bear this expense, asked a pointed and significant question: "Do you know of any abolitionist who will take these slaves and send them to Liberia, or place them in a state of freedom, in any of the States in which it is permitted to emancipate, or in which free colored persons may reside? Miss M. will cheerfully yield her right to such individuals. But she prefers Africa."⁸¹

In so far as the Abolitionists opposed the system of slavery, there can be no doubt that they did a great service to the cause of human freedom; but when this opposition took, as it continually did among the Garrisonians, the form of intemperate and untrue pictures of the system, and when it was distinctly applied in terms of personal abuse and slander to every man or woman in the South who owned a single slave, it tended more and more not only to make a general and peaceable emancipation an utter impossibility, but also to result in the enactment of measures more stringent than ever by State legislatures against the privilege of emancipating; and it was probably the means of preventing many a negro from securing his emancipation at the hands

⁷⁹ Letters of American Colonization Society, MS., Cooke to Gurley, Brems, March 31, 1833.

⁸⁰ Ibid., S. B. S. Bissel to McLain, Greenwich, Conn., February 15, 1845.

⁸¹ Ibid., T. P. Hunt to Gurley, Wilmington, N. C., June 17, 1834; *African Repository*, vol. xvi, pp. 263-264.

of his owner. It thus resulted in precisely that which the Garrisonians professed to oppose: "If it were evident that only by a short delay, he could be better prepared to receive the boon of liberty, still the slave ought to be a free man now."⁸²

It must not be supposed that the writer is unmindful of the fact that, during that important decade beginning with 1830, there was going on in the lower South a most important change of sentiment on the whole question of slavery, and that this change must not be too largely attributed to resentment that resulted from Garrison's methods. That change of sentiment was due, in great measure, to the rapid development of the Southwest and the increase in cotton production. Laborers were needed; the soil was, much of it, virgin and fertile; negro labor seemed admirably suited to the cultivation of cotton. The economic wastefulness of the slave system was not yet duly appreciated. The result was the internal slave trade between the upper and the lower South. Professor Thomas Dew's contribution to the Pro-Slavery Argument is indicative of this profound revolution in the attitude of the South toward both negro slavery and the Colonization Society. The Society made an effort to counteract the influence that Professor Dew's essay was undoubtedly beginning to have.

Jesse Burton Harrison wrote his Review of the Slave Question after correspondence with and with the cooperation of the most important officials of the Colonization Society, who gave him every encouragement. Harrison states the burden of his essay to be as follows:

To show the necessity of her [Virginia, in particular, and the South, in general] promptly doing something to check the palpable mischiefs her prosperity is suffering from slavery. We design to show that all her sources of economical prosperity are poisoned by slavery, and we shall hint at its moral evils only as they occasion or imply destruction to the real prosperity of a nation.⁸³

He undertook to show that "an improving system of agri-

⁸² See above.

⁸³ J. B. Harrison, Review of the Slave Question, pp. 9-15.

culture cannot be carried on by slaves"; that no soil, except the richest can be profitably cultivated by slaves, and even then only if its fertility is inexhaustible; that slaves are unfit to develop manufactures, one of the needs of the South; that "slave labour is, without controversy, dearer than free"; and that slavery discourages immigration. He further declared that "Virginia possesses scarcely a single requisite to make a prosperous slave labour State." "We state as the result of extensive inquiry, embracing the last fifteen years, that a very great proportion of the larger plantations, with from fifty to one hundred slaves, actually bring their proprietors in debt at the end of a short term of years. . . ."

Undoubtedly Dew's Essay had far more influence than did that of Harrison. The effort, in this study, is not to minimize the importance of the change that came over the South as a result of economic conditions, or to exaggerate the influence of the Garrisonians, but rather to compare the methods used by Colonizationists and Garrisonians and to set forth that, while both were positively opposed to the slave system, the methods of the latter were pregnant with serious mischief, while those of the former were indicative of a farsighted statesmanship. Dr. S. M. E. Goheen, the Missionary of the Methodist Episcopal Church to Liberia, said in 1838:

Having been educated in a non-slaveholding State, I was daily taught to look upon the man who held slaves as a monster scarcely human, and at all times to regard those engaged in or holding slaves as participating in crimes of the deepest dye; and notwithstanding I have resided in one, and traveled in several slave States, and *never* beheld the shade of a shadow of an attempt at the cruelties said to be practiced (daily) upon the slaves, yet it was impossible for me to overcome early prejudices, or to believe anything else than that slavery as there practiced, was the greatest evil in the States, or in the world, which I *now* very much doubt.²⁴

Instead of the methods used by the Garrisonians, the employment of statements untrue, in point of fact, and foolish, in point of policy, the Colonizationists came much nearer the true statement of conditions in the slaveholding States

²⁴ African Repository, vol. xiv, pp. 364-365.

and nearer securing the cooperation of the South in a gradual emancipation, by the employment of more accurate statements. This is well exemplified in a letter written by Gurley while in England in 1841:

I will not question the Honesty and benevolence of the great body of English and American Abolitionists, yet I regard many of their writings and proceedings as unjust to the public of the United States, particularly to the slaveholders and pernicious in all their tendencies. No one can more desire than the writer to see modification and amendment of the legal codes of the slaveholding States, in favor of the slaves. Atrocious crimes and cruelties are doubtless occasionally committed, in those States, on the persons of slaves. . . . Generally (and I speak from personal observation and inquiry in nearly all the Southern States of the American republic,) the citizens of those States are kind, humane, generous, and, in proportion to the whole population, equal to that found in most parts of Christendom, devout and exemplary Christians. No better friends have the slaves in any part of the world than are to be found in those States. Cases of harsh treatment, of severe punishment, of wanton disregard of their feelings, of the voluntary and cruel rupture of their domestic ties, of withholding . . . the necessities of life, or denying to them opportunities to hear Christian instruction and worship God, are not common; they are exceptions, not the rule. Liabilities to evil in the system of slavery are great; trying separations and wrongs among the slaves frequent, yet many laws which darken the statute books of the slaveholding States are in practice nearly, if not quite, obsolete; and humanity and religion are exerting a mighty and increasing influence for the protection and good of this dependent people.

Many, very many, masters and slaves are bound together by the ties of mutual confidence and affection. A large proportion of the slaves exhibit an aspect of comfort, contentment, and cheerfulness. There is much to regret, much to condemn, fearful evils which are perhaps never brought to light, in the system of slavery; yet all things (the very heavens themselves, as some would represent) are not wrapt in gloom. It is not to diminish the general sense of injustice as well as impolicy of slavery, viewed as a permanent system, that I thus write, nor that I would lessen the moral powers that are working for its abolition, but in reference to truth, and because he is blind who sees not that injustice to the master is injury and a crime against the slave. He who bears false witness against me, and seeks to destroy my reputation, must not expect to be my counsellor. If the abolitionists of New England and Old England have no influence among American slaveholders, and little with the citizens generally of the United States, to their errors in principle, and more to their faults and offences in practice, must they trace the cause.⁸⁵

Let us compare the effects on public opinion of these two methods, the Abolition method of antagonism and abuse and

⁸⁵ 27th Cong., 3d sess., H. Rept. No. 283, pp. 1024-1025.

the Colonization method of cooperation and sympathy, the one designed to bring about the immediate, and the other the gradual abolition of slavery.

Dr. John Ker, one of the most prominent Colonizationists in the South, who almost single-handed succeeded in defending the right of individuals of Louisiana to emancipate their slaves when they were willing to send them to the colony, when the State legislature was about to enact a very radical measure denying that right to a slaveholder who offered upwards of three hundred slaves to the Society,⁸⁶ wrote, in 1831:

The greatest difficulty we have to encounter is the *jealousy of Northern interference*, and of what the world thinks proper to call, "religious fanaticism." What, with you and me and all Christians would constitute the *highest* motive to exertion in this course, would only tend in Louisiana, (if urged at all), to paralyze and destroy the force of *other motives*, which fortunately are sufficient. I have myself received permission to use the names of some of the most influential men in the State; but it is difficult for you to conceive how essential it will be to present and great success, to avoid most scrupulously, anything which could excite the morbid sensibility of slaveholders and Southern men by jealousy of our Northern Brethren.⁸⁷

Let those who still believe that there existed between the Colonization Society and the slaveholders of Virginia a collusion whose object was the perpetuation of slavery, read the following comment upon the result of Garrisonian methods. A careful perusal of the quoted extracts from this private letter of a prominent Virginian ought to carry some weight in our views relative to (1) the supposed tendency of the Society to "rivet the chains of the slaves," (2) the views of active Southern Colonizationists on the subject of emancipation, (3) the methods advised by these men to bring about emancipation, (4) characteristics of the Southern temper on the whole subject of slavery, (5) the effects of Garrisonian abuse. The writer says:

It is a great mistake to suppose that the people of our State generally will shrink from . . . discussion, or are too sensitive to per-

⁸⁶ African Repository, vol. xviii, p. 99 ff.

⁸⁷ Letters of American Colonization Society, MS., Ker to Gurdley, Natchez, Miss., November 24, 1831.

mit it. On the contrary, I believe a very large proportion of the people, are willing to enquire into the merits of the slave system, and that many have their minds open to conviction upon the subject. Such violent tirades, however, as those issuing from the Anti-slavery presses of the North are calculated to do infinite mischief to the cause, and to rivet with a double bolt, the bonds they are intended to lose. You know that no man is more opposed to slavery than I am and have been for years. It is not, therefore, that any of their declamations about cruelty, manstealing, etc., has any effect on me, that I deplore their course, but I confess I am vexed to think that we, who entertain opinions averse to slavery here, who are ready and willing upon all proper occasions to assert and act upon them, who are perfectly acquainted with the subject, and with the temper of the people in this matter, should see all our hopes of finally eradicating this evil, spoiled and marred by the intemperance and folly, not to say wickedness, of those who are perfectly ignorant of the subject, its difficulties and dangers, but who ruin our chance of influence, by professing a common object with us. The object of all discussion on this subject, to do good here, should be, not to render the slaves discontented but to shew to the whites, of all classes, the baneful effects of the system upon them. It is perfectly obvious that slavery is a subject placed beyond the control of the General Government. It would therefore avail but little, so long as this Government lasts, if every man north of Mason and Dixon's line were deeply impressed with the impolicy, cruelty, injustice, or barbarity of slavery. That could not emancipate one wretch from bondage. "Emancipation" can never be effected without the consent of the slaveholders, and this can never be obtained by either abuse or threats. What we want is temperate argument, going to shew, the evils of slavery to ourselves, our posterity, and our country; the superiority in cheapness, convenience, and efficacy of free labor; then that the condition of the slave as well as the master would be improved by emancipation, and pointing out a mode in which this can be done safely without upturning at once all the foundations of society. Satisfy our people on these points and you will have thousands of converts to emancipation. The fact is . . . [abolition fanaticism] . . . paralyzes our efforts. No friend of emancipation amongst us, cares to open his mouth on the subject, for fear of being branded as an ally of Garrison, and of doing evil instead of good to the cause he would advocate.⁸⁸

Another Virginian, who would certainly not be included among her pro-slavery citizens, said of the Garrisonians:

Upon no other point connected with slavery have I ever known such unanimity in Virginia. The feeling of all of every age, that think about it, is this. It is a subject with which you *shall* not interfere; except indeed by scolding and calling names at the distance of three hundred miles; and that if, through the just judgment of Providence on our land, you shall ever get Congress to act on this subject, that moment the Union is dissolved.⁸⁹

⁸⁸ Ibid., Edward Colston to Gurley, Martinsburg, Va., July 9, 1833.

⁸⁹ Letter to Washington Colonization Society, MS., W. M. Atkinson to Polk, Washington, D. C., January 27, 1834.

Colonel Addison Hall thought in September, 1835, that the reaction against abolition excitement had become so strong in Virginia that "it paralyzes all effort. It would not only be unsuccessful, but attended with personal danger."⁹⁰ James Garland, a congressman from the same State, who had in former years been an interested Colonizationist, was driven, by the exaggerations of Garrisonians, to become an opponent of even Colonization. In later years he resumed his interest in the Society, but against every Garrisonian effort he stood distinctly pledged.⁹¹ And his position on the subject of slavery became violently anti-Garrisonian. A Methodist minister of New Orleans in 1838 wrote that the reaction against ultra-Abolitionism had had a distinctly harmful effect upon the comfort of the slave, and had been destructive of sentiment favorable to emancipation. The results of the efforts of Colonizationists had been favorable to emancipation.⁹²

Francis Scott Key thought that both the free negro and the slave, in all the Middle States, had been subjected to additional restraints directly as a result of the efforts of the Abolitionists. The efforts of these agitators he characterized as "most unfortunate."⁹³ Elliot Cresson wrote from New Orleans: ". . . so morbid is the South from the recollection of abolitionism, that it is scarcely credible how little will excite a storm."⁹⁴ There was a widespread complaint among the Colonization agents of the South, and among active Colonizationists of that section, that this anti-Garrison feeling had become so strong and so dangerous that the South had not only become less considerate of its slaves, but it had also begun to confuse abolition and colonization, looking upon the latter as "the A. B. C. of Abolition." Thousands of Southerners were undoubtedly driven

⁹⁰ Letters of American Colonization Society, MS., Col. A. Hall to Gurley, Richmond, Va., September 3, 1835.

⁹¹ African Repository, vol. xiv, pp. 43-47.

⁹² Ibid., vol. xiv, pp. 48-49.

⁹³ Ibid., vol. xv, p. 113 ff.

⁹⁴ Letters of American Colonization Society, MS., Cresson to Wilkeson, New Orleans, April 25, 1840.

to an extreme proslavery position as a result of Garrison's efforts.⁹⁵

Mathew Carey, of Philadelphia, and Roger M. Sherman, of Connecticut, may be taken as men of standing and influence in the sections from which they came. Both admitted the sincerity of the Garrisonians and at the same time both deplored the impolitic and injurious efforts that those abolitionists were making. Sherman was invited to attend the Anti-Slavery Convention in Albany, in 1839. In his refusal to be present Sherman expressed very clearly his views:

Had the Rev. Dr. Edwards, and others, who publicly espoused measures of emancipation adopted in Connecticut soon after the Revolutionary War, called slaveholders Man-Stealers, in staring capitals . . . would it not have excited, in the Northern Yankees, more of resentment than conviction, and less of compliance than opposition? The Southern people have felt, and to a great degree, justly, that the Abolitionists of the North were addressing their fears; and not merely their understandings or consciences. They have been addressed in terms of opprobrious criminations rarely softened by the language of respect. This has made them inaccessible, . . . and has, I fear, put off emancipation for at least half a century. . . . Could a missionary, thus addressing civilized heathen, hope for a favourable audience?⁹⁶

As representatives of the West, both Henry Clay and Elisha Whittlesey thought that the Garrisonians had done incalculable injury to both the white man and the slave, and even to the free negro.⁹⁷ A Colonization agent, Rev. M. M. Henkle, working in Ohio, summed up the results of Abolitionism as follows: ". . . contributing say \$50,000 pr. annum to inflame the passions of the North, wake the resentments of the South, fetter more firmly the bonds of

⁹⁵ Ibid., Wilkeson to Rev. T. B. Barto, March 27, 1840, No. 100; W. McKinney to McLain, New Bern, N. C., April 15, 1840; J. B. O'Neill to Wilkeson, Springfield, S. C., March 6, 1841; Wm. Crabtree to Wilkeson, Savannah, Ga., March 10, 1841; Gurley to R. S. Marvin, February 7, 1842, No. 582.

⁹⁶ *African Repository*, vol. xv, pp. 242-244; Letters of American Colonization Society, MS., Carey to Gurley, Philadelphia, December 22, 1829.

⁹⁷ *African Repository*, vol. xii, pp. 10-12; Letters of American Colonization Society, MS., Whittlesey to Wilkeson, Canfield, Ohio, March 16, 1840.

the slave, and strain the tender ligaments of the political Union, to the last stretch of endurance. . . ."⁹⁸

The most conclusive and interesting proof that Colonization had an influence beneficial and pronounced upon public sentiment at the South, and particularly upon slaveholders, is contained in a study of emancipations that were brought about by the influence of the Society.⁹⁹ But—and on this point present day writers have failed to do justice to the Society in their estimates of its importance—the effect upon public opinion is not to be measured alone in the number of emancipations effected or the size of the colony established. By far the most important influence the organization exerted prior to 1845 was its influence upon public opinion on the question of slavery. That influence was positive, though in large measure intangible and immaterial.

That between 1830 and 1840 the Colonizationists were drawing public sentiment, from New Orleans to Vermont, to a common view of the best solution of the whole negro problem, there is abundant evidence. In 1832 Dr. John Ker reported a large part of the most prominent political figures of Louisiana favorable to the colonization mode of dealing with slavery and the free negro.¹⁰⁰ In the same year, the Colonizationists were making their way into the confidence and were gaining the support of important officials in Virginia.¹⁰¹ In 1834 there were still citizens of Vermont who were willing and anxious to meet their brethren from New Orleans, and settle the slavery question on the terms proposed by the Colonizationists.¹⁰² In 1837, a joint committee of the Illinois legislature unanimously approved the colonization method, as had the officials of Louisiana and the citizens of Vermont. The Colonization societies, in their opinion, "were silently, but surely winning

⁹⁸ Letters of American Colonization Society, MS., Henkle to Gurley, Cincinnati, Ohio, June 18, 1838.

⁹⁹ See chapter below on Colonization and Emancipation, *passim*.

¹⁰⁰ Letters of American Colonization Society, MS., Ker to Gurley, New Orleans, April 4, 1832.

¹⁰¹ *Ibid.*, Atkinson to Gurley, Petersburg, Va., July 27, 1832.

¹⁰² *African Repository*, vol. x, p. 148.

their way upon public opinion, and entwining powerfully around the affections of the people." As to the Abolitionists, they "have forged new irons for the black man, and added an hundred fold to the rigor of slavery. They have scattered the firebrands of discord and disunion among the different states of the confederacy." The Colonization scheme was their choice.¹⁰³ In 1838 the Southern Literary Messenger was satisfied with the Colonization scheme as being the "juste milieu," "the broad platform upon which the friends of this unhappy race may meet in soberness and safety."¹⁰⁴ And in 1840 the committee of the Pennsylvania Legislature, to which the matter had been referred, reported colonization to be, in their opinion, "the only mode by which an equality of rights can be secured to that unfortunate race [the negro]."¹⁰⁵

Next, as to the results of Abolition and Colonization upon those religious bodies whose influence and organization extended throughout the Union. It has already been seen that before the rise of Garrisonism, there was great unanimity of sentiment in favor of Colonization among nearly all religious denominations. Again and again the Methodist church passed resolutions in its national gatherings warmly recommending the cause to the attention of its ministry. The same was true of the Presbyterian and of the Baptist churches. But as has also been seen, one of the most significant changes of sentiment brought about by Garrison's efforts was the change in the position New England churches took between 1831 and 1845. In 1831 public opinion was being led by sentiment in the churches; in 1845 public opinion was leading sentiment in the churches.

A study of the division of the Methodist church, 1844-1845, is of peculiar interest as exhibiting this change of sentiment that had been going on at the North. In 1834 a Methodist Conference, sitting at New Haven, Connecticut,

¹⁰³ *Ibid.*, vol. xiii, pp. 109-111.

¹⁰⁴ *Ibid.*, vol. xiv, p. 308.

¹⁰⁵ *Ibid.*, vol. xvi, pp. 136-137.

recommended the Colonization movement, and deplored the opposition of the Abolitionists, as "directly calculated to injure the best interest of colored men, whether bond or free," and also calculated to have the "most unfavorable results" upon the progress of Christian principles.¹⁰⁶ And yet, just ten years later, the organization of the Methodist church was rent in twain, and the territory from Maryland to the Gulf of Mexico came under the jurisdiction of the Southern Methodist Church. There has been much discussion upon the causes of that division; but the leading cause seems to the writer to be almost obvious, when viewed in the light of the attitude each section of that church took toward the Abolition and Colonization societies. It is universally admitted that the question of slavery was almost the sole cause of the disruption of that church. But was it the attitude of the Northern Methodists or of the Southern Methodists that brought about the division? In 1834 united Methodism was very favorable to the Colonization scheme. In 1845 the Southern Methodists were still favorable to it; but the Northern Methodists had come so far under the influence of Garrison, or they had been so far carried away from their position of ten years before by the tide of public sentiment, that, either because the majority of Northern Methodists had become Garrisonian or at least aggressively Abolitionist, or else because so strong a minority of them had gone over to that party, they forced the Northern majority by a threat of secession from them and secured the passage of a resolution whose effect was practically to suspend a Southern Bishop who had inherited two slaves.

The fact is that the Southern Methodist Church in 1845 retained the same good feeling for Colonization that it had in 1835; but the Northern section of Methodism had been borne away on the tide of Abolitionism. Whatever may be said about the legal forms the separation took, and whether by the acts of separation the Southerners seceded from the

¹⁰⁶ Ibid., vol. x, p. 127.

general body or the general body seceded from the Southerners, or whether the separation was completely by agreement—neither church seceding, but both agreeing peaceably to separate—it is nevertheless a matter of fact that in terms of ultimate and real causes, the Northern Methodists changed radically their views while those of the Southern Methodists remained practically what they had been in 1834. In 1835 both Northern and Southern Methodists were, as a body, opposed to radical Abolitionism. In 1845 the Southern Methodists were still opposed to it; while the majority, or a commanding minority of the Methodists of the North had become favorable to it. In 1835 Northern and Southern Methodists warmly recommended the Colonization Society. In 1845 it was the Southern church that warmly recommended it. That year the Mississippi Conference of the Southern Methodist Church unanimously adopted a resolution commending the cause of Colonization.¹⁰⁷

Northern Methodists had been drawn away from their former ground by the tide of public sentiment; Southern Methodists remained where they had stood ten years before. And George F. Pierce, later Bishop Pierce, was right in declaring at the General Conference of 1844: "The difficulties are with the New Englanders. They are making all this difficulty. . . ." ¹⁰⁸ Indeed, the Northern section of the church had gone so rapidly to the position of the Abolitionists that they were ahead of the regulations of their book of discipline. There had been no disciplinary rule adopted by which a slaveholding bishop could be suspended from the exercise of his functions; and the resolution of suspension was adopted largely, it seems, as a matter of expediency, to prevent the secession of the whole of New England Methodism.¹⁰⁹ Either because of its own convictions, or to save to itself New England Methodism, the

¹⁰⁷ Letters of American Colonization Society, MS., Pinney to McLain, New Orleans, December 13, 1845; December 14, 1845.

¹⁰⁸ G. G. Smith, *Life and Times of George F. Pierce*, chap. vi.

¹⁰⁹ *Ibid.*

Methodist Episcopal Church changed its attitude and thus abandoned the ground it had held in common with Southern Methodism.¹¹⁰ Few Virginians in 1846 were more ardent Colonizationists than Bishop John Early, president of the Petersburg Colonization Society. And that year both bishops of the Southern Church were Colonizationists,¹¹¹ as were leading Southern Methodist ministers, like William Winans of Mississippi, or John E. Edwards of Richmond.

One can without difficulty recognize the meat upon which the New Hampshire minister fed who, in advocating the resolution which brought about the division of the Methodist Church, declared: "Men-buyers are exactly on a level with men-stealers."¹¹² That was not the spirit of Colonization; it was the spirit of Garrisonian Abolition. It rent in twain other religious bodies. And it was because Garrisonian Abolition was fundamentally and essentially destructive of economic, social, political, and religious national unity. The influence of Colonization was exactly the reverse. We have seen its unifying influence in our study of its effect upon the public opinion of the United States. It was so in society. It was distinctly so in the church.

Finally, in comparing the methods and results of Garrisonian Abolition and the Colonization Society, it may be interesting to look for a while at the interchange of views that was taking place among Colonization leaders, and see how far those views will aid us in refuting the oft-repeated charges of the Garrisonians that, after all, Colonization was an enormous obstacle in the way of emancipation, and that its ally was the slaveholder.

As early as 1828 Elliot Cresson was urging upon the Secretary of the Colonization Society the importance of hearty cooperation between the Abolitionists and Colonization-

¹¹⁰ *African Repository*, vol. xix, p. 252.

¹¹¹ *Letters of American Colonization Society*, MS., T. C. Benning to McLain, Petersburg, Va., May 5, 1846; Rev. J. E. Edwards, Richmond, Va., May 25, 1846.

¹¹² Smith, p. 123.

ists.¹¹³ In 1831 one of the largest contributors to the Society in Kentucky was a man who had liberated his slaves and for five years refused to eat with a slaveholder, especially if he were a Methodist.¹¹⁴ Robert J. Breckenridge, of Kentucky, had made great sacrifice of reputation in order to aid the Colonization Society to hasten the day of general emancipation in his State.¹¹⁵ William M. Blackford, a leader among Colonizationists of Eastern Virginia, expressed himself as follows on the subject of slavery :

We have had reason to curse slavery within the last day or two, from a painful exemplification of its evils occurring under our own eyes. A year ago I bought [and therefore, by the reasoning of the Abolitionists, he was a man-stealer] a negro woman from a trader, to prevent her separation from her husband. She was truly gratified and has made us a faithful servant ever since. Her husband belonged to an estate. In dividing it, a sale became necessary, and without letting me know of it, he was sold to a trader. He was seized on the streets, handcuffed, and then permitted to take leave of his wife. He entered our yard, crying, and presented himself in that situation to his wife, who had not the remotest idea of such an event. I leave you to imagine the feelings of his wife—and also of Mrs. B[lackford]. It has prayed upon the latter's mind very much, and will, I fear, make her sick. The man was addicted to drink, but was civil and industrious, and made an affectionate husband. But I needn't pain you by reflections on this subject.¹¹⁶

J. Burton Harrison expressed the hope of Colonizationists generally when he wrote: "I am firmly persuaded that Kentucky is the most hopeful of all the slaveholding States (let me call them 'transition' States which seem not devoted to slavery in perpetuity, as Maryland, Virginia, Kentucky, and perhaps others) except Maryland."¹¹⁷ A letter which is typical of scores of letters that were sent out to the Society's friends from the central office, contains the following: "We must if possible start a ship *next month*. About 40 liberated slaves are now waiting and must be *sent*

¹¹³ Letters of American Colonization Society, MS., Cresson to Gurley, Philadelphia, August 23, 1828.

¹¹⁴ Ibid., Finley to Gurley, Winchester, Ky., June 8, 1831.

¹¹⁵ Ibid., R. J. Breckenridge to Gurley, Lexington, Ky., August 16, 1831.

¹¹⁶ Ibid., W. M. Blackford to Gurley, Fredericksburg, Va., October 4, 1832.

¹¹⁷ Ibid., Harrison to Gurley, New Orleans, May 16, 1833.

or *sold* for the *South!*"¹¹⁸ John McDonogh, one of the foremost Colonizationists of Louisiana, sought from the legislature of that State permission to educate his slaves—for it was against the law for him to do so without obtaining permission from the legislature. He owned slaves valued at \$150,000.00, and it was his purpose to colonize them all in Liberia, as they gave evidence of the ability to care for themselves.¹¹⁹ Gerrit Smith, who would hardly be, by any student of Abolition, accused of pro-slavery leaning, wrote, in 1828, concerning the alarm among slaveholders suspicious of the Colonization Society: "I must think that our slaveholders are causelessly alarmed at the American Colonization Society."¹²⁰ He realized perfectly well that the sympathetic attitude the Society assumed in its official journal towards the slaveholder was assumed, not out of a love for slavery, but out of a belief that the only way to persuade the slaveholder to emancipate his slaves was to secure first his friendship and respect and, as a result, the liberation of his slaves.¹²¹

Of course it was no difficult matter for the Abolitionists to take these very sympathetic utterances and build up a conclusive argument setting forth the base motives of Colonizationists. And they did so, although the motive that they "proved" was exactly the opposite of that which the Colonizationists actually had. What was used as a bait to to secure the liberation of slaves was pictured by the Garri-sonians to be the outcropping of the evil spirit back of the scheme. And yet a fair statement of its position was frequently made to the public in the *African Repository*. For instance, in 1830 it was there stated: "That the system of slavery must exist *temporarily* in this country, we as firmly

¹¹⁸ Ibid., McLain to Mrs. Ann Richardson, November 14, 1840.

¹¹⁹ *African Repository*, vol. x, p. 24.

¹²⁰ Letters of American Colonization Society, MS., Smith to Gurley, November 17, 1828.

¹²¹ Ibid., Smith to Gurley, Peterboro, N. Y., Feb. 6, 1831.

believe, as that for its existence a single moment, there can be offered justly no plea but necessity."¹²³

It was reasonably conclusive proof both of the sincerity of the Society and of the effectiveness of its methods that Francis Scott Key, appealing to Philadelphia for funds, reported that more than six hundred slaves were at that time offered by slaveholders on the condition of their removal to Liberia, and that only the funds were needed to secure their immediate liberation.¹²³

While the appointment of Dr. Ezekiel Skinner as colonial agent was under consideration, he thought wise to make clear his position on the subject of slavery. It was this:

I have ever held slavery in abomination as the blackest of the black catalogue of human crimes, the criminality of which is not in the least lessened by the authority of human laws and which will carry the souls of those who are guilty of this crime before the bar of God blacker with moral pollution than the skins of those whom they unjustly held in bondage.

I am friendly to the Colonization Society as presenting the only means now with[in] our power to emancipate many whom we have reason to believe would otherwise die in slavery.¹²⁴

This statement caused neither a withdrawal of his appointment nor criticism of his position.

At the annual meeting of the Society in 1834, Breckenridge thus stated the position of Colonizationists in their relation to the slaveholder: "We stand in the breach for him, to keep off the Abolitionists. We are his friends, but only to give him time. . . . And if he attempts to maintain slavery as perpetual, every one of us will be upon him too." At the same meeting Gerrit Smith reviewed several of the charges made against the Society, among which was the charge that there were at that time 265,000 persons "now in slavery, who would have been free if it had not been for the influence of this Society." A second charge was that all colonies whatever on the Coast of Africa went to sup-

¹²³ *African Repository*, vol. v, pp. 328-330; *Letters of American Colonization Society*, MS., Gurley to Fendall, New York, November 4, 1833.

¹²³ *African Repository*, vol. vi, pp. 138-139.

¹²⁴ *Letters of American Colonization Society*, MS., E. Skinner to Gurley, Ashford, Conn., January 23, 1834.

port, rather than suppress the slave trade. In its review of the speech, *The Liberator* maintained that both these charges were true.¹²⁵ It is an interesting fact that at that meeting it was a resident of Connecticut who urged the Society to confine its efforts chiefly to the transportation of free blacks, touching the question of slavery and emancipation as lightly as possible; and it was a resident of Maryland who urged that it concentrate its efforts upon transporting to the colony slaves emancipated for that express purpose—in short, that it become more pronouncedly a society whose purpose was the liberation of slaves.

Dr. Reese, one of the most prominent members of the New York City Colonization Society, thus expressed himself on his attitude towards slavery: "Sir, I abhor slavery, and therefore am I a friend of Colonization. . . . If slavery should not eventually, under the influence of kindness and confidence, be abolished, it would be because the visionaries of the North would prevent it."¹²⁶

If there was ever a time when the Colonizationists were unscrupulously assailed from both the press and the platform of the Garrisonians, that time was from 1831 to 1840. R. R. Gurley, Secretary of the Society, saw more and knew more of that storm than did any other individual. During that period the Society's purposes were continually misrepresented, and Gurley knew, for he directed, the movements and efforts of the organization. In a number of personal letters written to members of the Board of Managers during this period, Gurley sets forth clearly both his own views and the views of those Colonizationists with whom he talked as he traveled for the Society from Massachusetts to Georgia.

Of the influence of colonization in Maryland he writes: "In Maryland, the spirit of Colonization is increasing among the slaveholders and no difficulty is experienced in

¹²⁵ *The Liberator*, Feb. 8, 1834. Here will be found an account of the speeches made at this important meeting of the Society.

¹²⁶ *Ibid.*, May 24, 1834.

procuring emigrants of the best character, out of the city of Balto."¹²⁷ Of his hopes for Virginia he writes: "I trust Virginia will receive the special attention of the Board. Let her voice be with us; let her consent that Congress shall *appropriate money to colonization* and we have triumphed—slavery will go down with the consent of the South, and the Union will be preserved."¹²⁸ And again: "The people of the South must look to the Colonization policy as to the sheet anchor of their safety. Can they be so blind as not to see or so destitute of wisdom as not to prepare for the gathering storm? Can the South be induced to propose and support Colonization as a National measure looking to the final abolition of slavery? Will Virginia lead in the scheme? If so, all is safe."¹²⁹ Or again: "Let it be ours to bind together all the moderate and sober friends of Liberty and Africa in the Union."¹³⁰ After a journey into Louisiana and Mississippi, where several large bequests had recently been made for the Society, he commented: "Each successive year, hereafter, will bequests to our Institution be multiplying and increasing, thousands of slaves will be placed under the protection of the Society, and all motives concur to urge us to adopt all proper methods . . . to enable us to secure such bequests and the freedom and colonization of such slaves, as may be entrusted to our care."¹³¹ Kentucky, he thought, had proved a profitable field for Colonization effort, and he believed that the result was a rapidly growing disposition among her slaveholders to liberate their slaves, on condition of their emigration to the colony.¹³²

Whether or not the very advocacy of gradual emancipation was of itself a hindrance to immediate emancipation there might be, and doubtless was wide difference of opin-

¹²⁷ Letters of American Colonization Society, MS., Gurley to Fendall, Boston, August 3, 1835.

¹²⁸ Ibid., Gurley to Gales, Boston, Oct. 3, 1835.

¹²⁹ Ibid., confidential, Gurley to Fendall, Boston, October 7, 1835.

¹³⁰ Ibid., Gurley to Gales, Philadelphia, December 12, 1835.

¹³¹ Ibid., Gurley to Gales, Louisville, Ky., July 25, 1836.

¹³² Ibid., Gurley to Fendall, Athens, Ga., June 7, 1837.

ion. If Abolitionists had urged this as the inevitable result of any scheme of gradual emancipation, the Colonizationists could have had no just quarrel. Such a question might have been threshed out on the battleground of reason. The great blunder the Garrisonians made was not in arguing that the tendency of Colonization was necessarily to put off the hoped-for day, but that it was the deliberate purpose of Colonizationists to put off that day. There have been found, among the records of the Colonization Society, prior to 1846, two letters which go to show that the members of one auxiliary Colonization Society, in Tennessee, and a number of lukewarm friends of the cause in Alabama based their support of Colonization upon the ground, either of its usefulness as an ally of the slaveholder, in removing the distracting free blacks from the possibility of their influence over the slaves, or of its usefulness in relieving a section undoubtedly burdened with free blacks.¹²² And the writer of the letter from Alabama understood well enough the true objects of Colonizationists, to accuse his neighbors of "Machiavelism." Voluminous evidence, forsooth, upon which to make out a case for the Garrisonians!

It would not be difficult to show that there were cases in which the Garrisonians themselves prevented emancipations. In 1839, for instance, a Colonization agent was approached by a Kentucky slaveholder, who desired to emancipate his twenty slaves, giving them five hundred dollars, on condition of their willingness to go to Liberia. Upon invitation, the agent addressed the slaves and secured their consent to go. But the next morning they had all, save one, changed their minds. The cause of this change the master attributed (1) to the influence of the Garrisonians, who continually reminded the slaves that the Colonizationists desired to "banish" them, or to "expatriate" them, and (2) to the rumors that had come to them of violent cases of seasickness and deaths, which, with the rest, the Garri-

¹²² *Ibid.*, H. A. Wise to Gurley, Nashville, Tenn., January 9, 1830; W. C. Dennis to Gurley, Blakeley, Ala., December 21, 1838.

sonians did not hesitate to publish.¹⁸⁴ In 1840 the executor of Thomas Hall of Virginia who, by his will liberated some twenty-five of his slaves—each to be given twenty-five dollars if he agreed to go to the colony, and those refusing to go to revert to slavery—in reporting those who desired to emigrate, expressed his desire to go about through the community and solicit from his neighbors subscriptions to increase the allowance of the negroes who were about to leave; but he was prevented from doing so “by the wretched policy of the abolitionists,” who had “created a prejudice against even colonization here, that threatens all hope of carrying on its operations south of Mason and Dixon’s line. A man is in danger of being charged with a leaning to abolition if he advances Colonization.”¹⁸⁵

Such examples could be multiplied many times, and yet, it would be manifestly unfair to argue that the Garrisonians were opponents of emancipation. The charges of the Garrisonians were every whit as unfair. There were those in Kentucky who believed that, but for the extreme and radical opposition of the Abolitionists to Colonization, Kentucky would by 1840 have been practically ready to pass a general emancipation law. And of a large number of slaves owned by Mr. Black of Tennessee, and offered to the Society upon certain conditions, but who had fallen into the hands of ill-disposed heirs and sold to the Southwest, Secretary McLain wrote: “We begged hard for them but the country did not respond and now they are beyond our reach—and involved in perpetual slavery.”¹⁸⁶ May it not be asked whether some of the money used in spreading baseless slanders against the Colonization Society might not profitably have been used in contributions to that Society, to secure the liberation of proffered slaves?

A leading minister of Mississippi declared, in New York, that the Colonization Society had had a tremendous influ-

¹⁸⁴ Ibid., G. W. Fagg to Wilkeson, Elizabethtown, Ky., September 19, 1839.

¹⁸⁵ Ibid., E. Broadus to Wilkeson, Culpeper, Va., August 11, 1840.

¹⁸⁶ Ibid., Cresson, Washington, June 3, 1844.

ence in preparing the way for the opening of the door of a gradual, but complete emancipation in that State, but that the rise of rabid Garrisonism had been one of the foremost agents in closing "every door that had been opened for the escape of the slave. . . ." ¹³⁷ A plain miller of eastern Virginia, not troubled with the "too liberal construction" fears of his more learned fellow citizens, wrote to the Society, requesting the transportation of his family of six slaves, and expressed the opinion that, if the federal government and the Abolitionists would cooperate with Colonizationists, they could "heal a disease that, if not arrested, is likely to dissolve the Union." ¹³⁸ From these evidences it seems clear that among the results of Garrisonian Abolition in the South are to be mentioned not only a change very unfavorable to voluntary emancipation, but also a large number of instances of actual prevention of immediate emancipation. And yet it would obviously do violence to the true interpretation of the Garrisonian faith to accuse its representatives of hostility to the immediate emancipation of slaves.

J. G. Birney, at this time an agent of the Colonization Society and soon to become Abolitionist, gives an interesting summary of his view on prospects in the South. These views are entitled to considerable weight, in the light of Birney's later prominence in political abolition and his place in the Liberal Party. In 1833, he wrote, of the prospects of getting rid of slavery in the slaveholding States:

The only effectual way that seems open to my view, is the withdrawing of Virginia from the Slave States, by her adoption of some scheme of emancipation. Should this be done, the whole system of slavery in the U. S. would, upon the very pressure of public opinion, be brought, and that in a few years, in shivers to the ground. In proportion as the slaveholding territory is weakened in political influence, it will be weakened in the power of withstanding the force of public sentiment; and the last State in which slavery shall exist . . . will . . . be perfectly odious. (The proceedings of the Abolitionists of the North have a very injurious effect here—they seem to furnish a kind of justification of slavery itself to the Southern slaveholders. I assure you, sir, I have nothing left but *hope* for

¹³⁷ African Repository, vol. xx, p. 183.

¹³⁸ Letters of American Colonization Society, MS., John Gray to McLain, Fredericksburg, Va., January 27, 1845.

the South. By the word *South*, I mean South—Ala., Missi., Loua. In 20 years they must be overrun by the blacks. There is no escape but in doing that, which, I am almost certain, will not be done.) What I would now suggest, would be to press with every energy upon Maryland, Virga. and Ky. for emancipation and colonization. If Virga. be not detached from the number of slaveholding States, the slavery question must inevitably dissolve the Union, and that before very long. Should she leave them, the *Union will be safe*, tho' the suffering of the South will be almost unto death. . . . I greatly approve of your opinion, that "for some years, at least, the North should *forbear*," that everything that looks like relief for the South may be attempted.¹³⁹

Two and a half months later he wrote again:

I do not believe, that anything effectual can be done *South* of Tennessee. In the spirit of emancipation which the colonization cause has produced, the planters of the South see that it does *affect* the subject of slavery. This they are determined not to have touched *in any way*. It is my sincere belief that the South—at least that part of it in which I have been operating has, within the last year, become very manifestly, more and more indurated upon the subject of slavery.¹⁴⁰

It was precisely this hope of winning the Middle States, that continued to permit slavery, and thus to win its way further and further down into the lower South, all the while making whatever efforts it could in the newer Southwestern States, that actuated the Colonization Society. With Virginia, Maryland, Kentucky, and Tennessee among the free States, the pressure of public opinion and the futility of physical opposition would make the entire Union some day, without a national upheaval, free from the blight of slavery. In the language of Francis Scott Key: "No slave State adjacent to a free State can continue so."¹⁴¹ It was always in these "adjacent" States that the condition of the slaves was least undesirable, and hence, in which the accusations of the Garrisonians were most unfounded in fact. It was here also that the influence of the Garrisonians reached most directly, and where the reaction against both Abolition and Colonization, on account of the Abolitionists, was, if not more defiant, nevertheless most destructive.

If the sincerity of the Colonization cause, which the Gar-

¹³⁹ Ibid., Birney to Gurley, Huntsville, Ala., September 14, 1833.

¹⁴⁰ Ibid., Birney to Gurley, Danville, Ky., December 3, 1833.

¹⁴¹ See above.

risonians charged with hypocrisy, has not yet been conclusively set forth, no more convincing documents could be recommended to the consideration of the investigator than the lengthy and comprehensive letter of Birney, on his severing his connection with the Colonization movement to become an Anti-Slavery leader, or a similarly lengthy and comprehensive letter of Gerrit Smith, just a short while before he also went over to the Anti-Slavery party. Birney's objection was not founded upon the discovery of any deviation from the straight line of an altogether laudable policy to place the free negro in a position where he would not be held down by the shackles of prejudice and, by peaceable means, to bring about the ultimate and entire abolition of slavery, but upon the belief that: "There is not in colonization any principle, or quality, or constituent substance fitted so to tell upon the hearts and minds of men as to ensure continued and persevering action."¹⁴² And the letter of Gerrit Smith contains one of the most exhaustive, eloquent, and comprehensive defences of the motives of the leaders of the Society that has been presented to the public. His objection was not based upon any discovery of the slightest proslavery designs or feelings among those leaders, but upon the objection, in many respects the very opposite of that given by Garrisonians, that the Society had been neglectful of the American negro who was already free.¹⁴³

It was a great struggle, that between the Garrisonians and the Colonizationists. Verily, it was the first American civil war on the subject of slavery. For ten years it raged. The outbreak of it was due to Garrison and his confederates and, from first to last, it was a defensive contest from the point of view of the Colonization Society. When it began, the States were divided into three comparatively distinct sections, the New England, the Middle, and the Southern. The Middle States extended from New York on the North to North Carolina on the South. There were three pre-

¹⁴² *The Liberator*, August 16, 1834.

¹⁴³ *Ibid.*, January 24, 1835.

vailing opinions. In the New England section, it was the Abolition sentiment, in the Middle section, it was the Colonization sentiment; in the Southern section, it was the positive pro-slavery sentiment. The outcome of that struggle is of deep significance; for when the end of it had come, the middle section had disappeared, so far as its importance as a "buffer state" of public sentiment is concerned. Henceforth there was to be a North and a South.

Striking evidence of this is seen on the one hand in the fact that as early as an annual meeting of the Society in 1834, the delegates from Pennsylvania and New York had thrown many of their former moderate views to the winds and were definitely antislavery; and on the other hand, the fact that the North Carolina Manumission Society founded in 1816 and, by 1825, boasting of fifty-eight auxiliaries and 1600 members, and the sympathy of probably a majority of the citizens of that State, founded with the avowed and definite purpose of freeing North Carolina slaves, held its last meeting in 1834, and failed in no small measure because of the revolt of North Carolinians from any thing that in the least savored of a Garrisonian program.¹⁴⁴

Under able business management and an efficient corps of agents and advertisers, Colonization was to continue to do an important work; but the character of that work had changed. The struggle waged by the Abolitionists had made quite improbable, in the minds of the mass of Americans, the solution of the negro problem by the colonization plan. Many thousands of dollars were still to be contributed; but the contribution was made rather as an aid to the establishment of a model negro republic in Africa, whose effect would be to discourage the slave-trade, and encourage energy and thrift among those free negroes from the United States who chose to emigrate, and to give native Africans a demonstration of the advantages of civilization. In short, the eyes of Colonizationists were in great measure turned from a Southern slave system to a Republic of Liberia.

¹⁴⁴ University of North Carolina Magazine, vol. xiv, No. 4, p. 221.

Colonization continued to have a wide influence in almost every part of the country. But it ceased to have a controlling influence in any part of the country. The Abolitionists had enlisted those who were to be henceforth pro-Northern advocates; and it had definitely alienated the rest of those who had once been moderate. In a word, the Garrisonians had done much dangerously to divide the Union into two opposing sections whose sentiments were in the days to come little tempered by so moderate and unifying and healing a sentiment as that held by Colonizationists. From the point of view of its influence upon the subject of slavery Garrison undoubtedly won his fight, and in doing so, he was the forerunner and one of the leading "irrepressible" causes of the "irrepressible" conflict. Many bequests were yet to be made to the Society, many slaves were yet offered their freedom on condition of emigration, many efforts were yet made by those patriots, proponents of Colonization, to hold the Union together, and the Colonization Society lived on, doing a commendable work; but the character of its work was fundamentally changed by the conflict which began in 1831, and whose influence was actively alive as late as 1845, though the struggle for supremacy may be said to have come to an end.

By 1842 Garrison was calling the roll of his ultra-Abolitionist co-workers, and he noted the absence of most of them. "The time was," said he, "when Arthur Tappan stood deservedly conspicuous before the nation as an abolitionist, . . .; but where is he now?" "Where is James G. Birney? In Western retiracy, waiting to be elected President of the United States, that he may have an opportunity to do something for the abolition of slavery." "Where is Henry B. Stanton? Studying law, (which crushes humanity, and is hostile to the gospel of Christ,) and indulging the hope of one day or other, by the aid of the Liberty party, occupying a seat in Congress. . . ." "Where are Theodore D. Weld and his wife, and Sarah M. Grimke?" "Where is Amos G. Phelps? . . . He is a petty priest, of

a petty parish, located in East Boston. What a fall!" "Where is Elizur Wright, Jr., once a flame of fire . . .? Absorbed in selling some French fables which he has translated into English! 'Et tu, Brute!'" "Where is John G. Whittier?" "Where is Daniel Wise?" "Where is Orange Scott . . .? Morally defunct." And so on, through a list of seventeen names, on all which the African Repository commented: "He could not name ten others, who, in the days of his greatest success, were equally efficient in his service."¹⁴⁵ What was the trouble? Why had these flames gone out? Perhaps, New Englanders, the wisest of them, were coming to see the futility of blatant Garrisonism.

¹⁴⁵ African Repository, vol. xviii, pp. 327-329.

CHAPTER IV

COLONIZATION AND EMANCIPATION, 1817-1850

A study of the operations of the American Colonization Society, if it is to set forth fairly and completely the Colonization movement, must present the efforts of that organization from two distinct points of view: (1) its effects and results in relation to the question of slavery, and (2) the degree of its success in establishing upon the west coast of Africa an asylum for the American free negro, or the American slave manumitted or emancipated with a view to emigration to the Society's settlements, and for Africans recaptured from slave vessels and restored to their native land. In a consideration of its bearings upon the solution of the problem of slavery, no more important topic can be discussed than the influence of the Society in encouraging a spirit in the South favorable to emancipation. An accurate estimate of that influence is as difficult as it is important. Records of emancipations or manumissions are so incomplete and unsatisfactory that no summary can be made which will be at once exhaustive and analytical. If every slaveholder who emancipated his blacks told us whether he did so as the result of a distinct influence exerted by the Society, the problem would be much simplified. But frequently the emancipator discussed but briefly the influences that led to the freeing of his slaves. In many cases he, himself, was probably unable to analyze those influences. Perhaps he had been led to give his negroes their freedom because he lived in a community where emancipation was "in the air." And perhaps that was the influence of the Colonization Society at work. Influence cannot be measured with a yard stick; and it is exceedingly difficult to measure it at all.

A further difficulty is found in the fact that several notices might appear in either the official minutes or the official journal, the investigator being unable to tell whether the notices referred to are notices of the same or of different cases of emancipation. The result is likely to be a confusion of estimates.

It has already been pointed out¹ that, from the hour of its organization, indeed, before that hour, it was hoped that one of the important influences colonization might exert would be that in favor of the gradual and entire abolition of slavery, through its influence in favor of voluntary emancipation. At an early date William Thornton had already expressed the desire and the hope that it might "afford the best hope yet presented of putting an end to the slavery in which not less than 600,000 unhappy negroes are now involved." He foresaw the day when conditions in the South would bring about the enactment of laws prohibiting emancipations, unless accompanied with a provision for removal from the state.² [Before the Colonization Society was a year old, the Manumission Society of North Carolina had become interested in cooperating with it, and after ten years' observation of its influence in favor of the emancipation of slaves, warmly recommended it and pledged its own support.³ In a memorial presented to Congress in 1819, a committee, composed of two Virginians, John Mason and General Walter Jones, one Marylander, Francis Scott Key, and one member from the District of Columbia, Dr. E. B. Caldwell, expressed the view that if Colonization resulted in the complete abolition of slavery, "Who can doubt that of all the blessings we may be permitted to bequeath to our descendants, this will receive the richest tribute of their thanks and veneration."⁴]

¹ See above.

² Thornton Papers, MS., vol. xiv, MSS. Div., Library of Cong.

³ Journal of Board of Managers of American Colonization Society, MS., September 19, 1817; Manumission Society of North Carolina to American Colonization Society, MS., September 17, 1827.

⁴ Minutes of Board of Managers of American Colonization Society, MS., December 10, 1819.

The Managers, in their annual report in 1820, declared, "the hope of the gradual and utter abolition of slavery, in a manner consistent with the rights, interests, and happiness of society, ought never to be abandoned."⁵ In their annual report in 1822, the same body expressed, not only the hope, but the satisfaction, of seeing distinct evidences of the willingness of slaveholders to liberate their slaves for the purpose of sending them to Africa.⁶ The delight of those Managers was expressed in still stronger terms in 1823.⁷ Lafayette, for whom the leaders of the Society had great respect, and who was one of its vice-presidents, looked to the day when its influence in bringing about emancipation would be of great importance.⁸ From the time of its organization to about 1825, the leading motive of those who controlled the organization was the elevation of the American free negro; but the most important secondary result that they hoped the Society might have was the widespread cultivation of a sentiment favorable to emancipation. After 1825 the desire for the uplift of the free negro and the liberation of the slave came to be equally important, it seems, in the policy of the Society. And gradually, and for years thereafter, its efforts were directed more to securing the emancipation of slaves than to the elevation of the free negro. It has already been seen that Gerrit Smith, in leaving the Society, made this very criticism of it.

Although at no time was the influence of the Colonizationists exerted in opposition to emancipation, it is true that during its early years, the Society was careful to violate neither its own constitution nor local, municipal law on the subject of slavery. For instance, there were cases in which runaway slaves came to the Society's agents, requesting to be sent to Liberia.⁹ Such requests were refused. Re-

⁵ Origin, Constitution, and Proceedings of American Colonization Society, MS., vol. i, p. 107.

⁶ Ibid., vol. i, p. 190.

⁷ Ibid., vol. i, p. 209.

⁸ African Repository, vol. i, p. 285.

⁹ Letters of American Colonization Society, MS., C. Wright to Gurley, Montpelier, December 29, 1826; Minutes of Board of Man-

quests were made to the Society to apply its funds directly to the purchase of slaves for transportation to the colony. These also were refused, though agents of the Society were willing and glad to furnish lists of slaves who might be purchased in order for transportation; and Gurley even went so far as to suggest that if funds were placed in the hands of the Colonization Society for the express purpose of being applied to the benefit of those who, if such funds were not available, would revert to slavery, the Society would gladly make use of such funds for the purpose designated.¹⁰ And there is on record a case in which twelve or fifteen slaves in Virginia were held in slavery for want of funds to secure their being placed in the hands of the Society. Gerrit Smith, already turned Abolitionist, refused, it seems, to furnish the financial assistance, and John McDonogh, of New Orleans, a leader among Colonizationists, directed the treasurer of the Society to draw on him for the required amount.¹¹ When in 1843 McLain, Treasurer of the Society, was working for the cause in Louisiana, he reported to the Washington office that he hesitated to appeal for funds because the Louisiana Society wished the first three hundred dollars raised to be applied to the purchase of "the learned Blacksmith of Alabama," a remarkable negro slave. This he felt to be a violation of the constitution of the Society.¹²

The tendency, however, never was to construe too strictly, but too liberally, the terms of the constitution in this respect. The inclination of Colonizationists was so favorable to emancipation that now and then resolutions were submitted and adopted, whose object was to remind the Society that its purpose was, historically, to secure the elevation of the free negro rather than the liberation of the slave. Hon.

gers of American Colonization Society, MS., Sept. 26, 1827; December 12, 1827; May 19, 1828.

¹⁰ Letters of American Colonization Society, MS., Gurley to Rev. H. J. Ripley, December 9, 1842.

¹¹ Ibid., Gurley to Ripley, December 9, 1842, No. 499.

¹² Ibid., McLain to Gurley, New Orleans, May 6, 1843; Finley to Gurley, Natchez, May 4, 1843.

Robert M. McLane of Maryland secured in 1849 the passage of such resolutions, which set forth well the attitude the Society took:

Resolved, That in all action affecting this institution [slavery] in its social or political aspect, the American citizen and statesman who reveres the Federal Union has imposed upon him the most solemn obligations to respect in spirit and letter the authority of local and municipal sovereignties, and to resist all aggressive influences which tend to disturb the peace and tranquility of the States, that may have created or sanctioned this institution.

Resolved, further, That the efforts of the American Colonization Society to facilitate the ultimate emancipation and restoration of the black race to social and national independence are highly honorable and judicious and consistent with a strict respect for the rights and privileges of the citizens of the several States wherein the institution of slavery is sanctioned by municipal law.¹³

Such reminders were needed especially for the auxiliary societies which, in many instances, were with the greatest difficulty prevented from going farther than was consistent with the constitution in the effort to liberate slaves. Notable among these was the Philadelphia Society. Elliot Cresson, for instance, wrote in 1830 that Philadelphians wished their funds used "for the special purpose of sending manumitted slaves," and suggested that free negroes be required to pay their own transportation expenses.¹⁴ Thomas Buchanan, while agent for the New York and Philadelphia Societies, and a short while before his appointment as colonial governor of Liberia, secured not only the liberty of forty slaves but also a contribution of fifteen hundred dollars from their owner to be applied for their benefit.¹⁵ In 1843 Treasurer McLain, of the parent Society, was writing to Virginians inquiring for the names of slaves whose liberation could be secured on condition of their removal to Africa. He thought he could raise the money with which to secure the liberty of some of them, though here he was undoubtedly going beyond the constitution of the Society. He wrote: "We have many friends who are beginning to

¹³ Minutes of Board of Directors of American Colonization Society, MS., January 16, 1849.

¹⁴ Letters of American Colonization Society, MS., Cresson to Gurley, Philadelphia, September 23, 1830.

¹⁵ African Repository, vol. xiv, p. 54.

feel a strong desire to aid in sending slaves to Liberia who cannot be set at liberty unless they are sent and who cannot be sent unless somebody gives the means."¹⁶ In 1843 the Massachusetts Society was placing on certain of its donations the proviso that they should be used in defraying the expenses of emancipated slaves.¹⁷ In 1845 the Massachusetts agent wrote: "I think we can get the money for those seven slaves; and *some* of it will be money that we should not otherwise receive."¹⁸

A peculiarly interesting case is that of the Kentucky slave, Reuben. Rev. J. B. Pinney, agent for the Colonization Society, had gone to Kentucky to collect a group of liberated slaves, twenty-one of them, and conduct them to the port of embarkation for Liberia. Among the number was a family of children whose father was still a slave. A meeting was held in the church, of which the prominent Colonizationist, Dr. Breckenridge, was pastor. Reuben was asked if he would like to accompany his children. He expressed great desire to go. The audience was asked whether they desired at once to purchase Reuben and send him and his children. Hardly had the invitation to contribute been given when the President's table was surrounded by those who within a few minutes had contributed a fund sufficient to secure Reuben's release.¹⁹ This is interesting not alone as an incident, but because it throws a light upon the attitude that a group of Colonizationists in a border slaveholding State took toward the emancipation of a slave for the purpose of transportation to the colony. Examples will hereafter be given to show that these efforts to secure the emancipation of slaves were not confined to the New England or the Middle States. Hundreds of slaves in Louisiana, Mississippi and Tennessee, as well as in Kentucky and

¹⁶ Letters of American Colonization Society, MS., McLain to Tracy, March 7, 1843, No. 743; McLain to C. W. Andrews, March 7, 1843, No. 744.

¹⁷ Ibid., Gurley to Whittlesey, Boston, June 9, 1843.

¹⁸ Ibid., Tracy to McLain, Boston, April 21, 1845.

¹⁹ African Repository, vol. xxi, pp. 11-12.

Virginia, were liberated because of the efforts of Colonizationists.

Of the effect of Colonization upon the spirit of emancipation, considering the South in general, President Thomas of the Baltimore and Ohio Railroad wrote, in 1829: "... the exertions of the Society have already effected a moral influence which is obviously perceptible," although he realized that Colonization was only one of the various causes of the change in sentiment.²⁰ In 1830 Key announced that there were at that time more than six hundred slaves willing to go to Liberia and offered by their owners to the Society, as soon as its means were sufficient to care for so many.²¹ Benjamin F. Butler, soon to be attorney-general in Andrew Jackson's cabinet, believed that the Colonization Society had already "done more to promote in the Southern States the Emancipation of slaves, than had been accomplished by all the efforts made with direct reference to such a result, since the revolution." He stated that the report of every auxiliary society in the South had testified to the willingness of many slaveholders to emancipate their negroes as soon as they could be transported and cared for by the Society.²² William Maxwell, a leading Colonizationist of Virginia, bore witness to its power as an encouragement to slaveholders to manumit their slaves.²³ Elijah Paine, of Vermont, expressed a similar view.²⁴ In the *African Repository* for 1842, there are notices of between five and six hundred slaves emancipated for the purpose of transportation to Liberia, and it must not be forgotten that many slaveholders who were willing to send their negroes to the colony refused to allow their names to appear in the public press.²⁵ In 1845 the official journal of the Society announced: "Hundreds of slaves have already been set free

²⁰ Letters of American Colonization Society, MS., P. E. Thomas to Gurley, Baltimore, September 30, 1829.

²¹ *African Repository*, vol. vi, pp. 138-139.

²² *Ibid.*, vol. vi, p. 162.

²³ *Ibid.*, vol. xiii, p. 55.

²⁴ *Ibid.*, vol. xv, pp. 44-48.

²⁵ *Ibid.*, vol. xviii, passim.

in order that they might be removed to Liberia. Hundreds more are now offered to the Society, if it will assume the expense of sending them out."²⁶

Of the effect of the Society's influence in Kentucky, the general agent for the West reported

a growing disposition for gratuitous manumission and . . . an avowed determination on the part of some of our most influential men to press with all their might the subject of gradual abolition in case a convention shall be called to settle the disturbances of our State, a resolution for which has been already introduced in the House of Representatives. I mention this for your *private* satisfaction; I mean to say its publication would be premature. Twenty-two slaves with the means of transportation were the other day willed to the Society by a gentleman in Bourbon County and eighty-odd have been very recently liberated by one man in Clarksville, Tennessee. I would mention several other cases of which I have been particularly informed.²⁷

Again, in 1829, he wrote that many slaveholders were ready to liberate their slaves when they could be received by the Society.²⁸ A member of the Kentucky State Society called attention to the very widespread sentiment in favor of emancipation, and attributed it, in considerable measure, to the influence of the Colonizationists, though he admitted that an effort had been made to drag it into politics, the Jackson men saying "it is a party thing."²⁹ R. J. Breckenridge, while yet a resident of Kentucky, declared in 1831:

It is now generally admitted, that a very large number of those owning slaves, perhaps as many as one-third of them, would decidedly favor the gradual emancipation of the slaves of this State; provided the great accumulation of free negroes supposed to be consequent on such a step could be avoided. Among the non-slaveholders, I never saw a person of ordinary intelligence, who was not decidedly favorable to some efficient project of that sort.

[One of the secrets of the Society's influence throughout the upper South was that it proposed not only to emancipate, but also to remove; and it must never be forgotten that one of the most powerful objections to the abolition of

²⁶ Ibid., vol. xxi, pp. 145-149; vol. xix, p. 189; vol. xx, p. 229; Letters of American Colonization Society, MS., Mary B. Blackford to Gurley, Fredericksburg, Va., January 28, 1843.

²⁷ Letters of American Colonization Society, MS., B. O. Peers to Gurley, Maysville, Ky., December 11, 1826.

²⁸ Ibid., Peers to Gurley, Feb. 7, 1829.

²⁹ Ibid., Gurley, Lexington, Ky., September 5, 1828.

slavery, from the point of view of the South, was that the free negro would become a black peril to the South.²⁰

Robert S. Finley, a son of the venerable Robert Finley, assured the parent Society that it could secure without difficulty all the emigrants it could accommodate. "I have heard," he wrote, "within the last ten days without making particular inquiries on the subject of hundreds of slaves who are only held in bondage until the Colonization Society will undertake to colonize them. And I have no hesitation in saying that there are *thousands* of slaves in this State who are merely held by their masters *in trust* for the same praiseworthy object."²¹ In 1839, an assistant secretary of the Society wrote as hopefully as had Finley.²² Elliot Cresson, traveling in the interest of the Society, wrote from Mississippi in 1840 that the whole South, and particularly Kentucky, seemed to be ready to cooperate in the colonization of its slaves.²³

In Virginia there were not wanting signs of the Society's influence. The State Colonization Society and the Lynchburg Society reported large numbers of slaves, as well as free negroes, desiring to go to the colony, many of the slaves being offered their liberty on condition of removal by the Society.²⁴ Monroe once told Elliot Cresson that if the Society could raise funds sufficient to care for the settlers, he could procure ten thousand slaves by emancipation in Virginia alone.²⁵

In North Carolina as late as 1840, the Society's agent reported continued growth of sentiment favorable to emancipation if accompanied by removal. One slaveholder, the

²⁰ *African Repository*, vol. vii, pp. 48-49.

²¹ Letters of American Colonization Society, MS., R. S. Finley to Gurley, Lexington, Ky., April 12, 1831.

²² *Ibid.*, Knight to Wilkeson, Frankfort, Ky., November 30, 1839.

²³ *Ibid.*, Cresson to Wilkeson, Natchez, Miss., April 13, 1840.

²⁴ *African Repository*, vol. iv, pp. 307-311; vol. v, p. 203; vol. vi, pp. 214-215; Letters of American Colonization Society, MS., Atkinson to Gurley, Petersburg, Va., December 17, 1831.

²⁵ *African Repository*, vol. xv, p. 84; Letters of American Colonization Society, MS., Gurley to Rev. Stephen Taylor, July 13, 1842, No. 148.

owner of upwards of one thousand negroes, was reported as determined to emancipate them all if the colony continued to improve and if the Society could make provision for them.²⁶ So efficient were the North Carolina Quakers in their cooperation with the Society, that they alone seemed able to supply all the emigrants that could be accommodated with the limited means of the Colonizationists. From 1825 to 1830, slaveholders in that State placed in the hands of these Quakers hundreds of slaves, on condition of their removal to Liberia.²⁷

It must not be supposed that there were no counter influences. In comparing the Abolition and Colonization movements it has already been set forth that one of the strongest of these counter forces was the Abolitionists themselves. Whether by picturing in dark colors the motives of Colonizationists, or by assuring the negroes that emigration was not their privilege, but rather their banishment, or by picturing the terrors of the sea or the ferocity of the native Africans or the fatal consequences of the period of acclimation in the colony, or the fact that the negro had a right to enjoy the same privileges in America that his white brother had, or by speaking of slaveholders, and to slaveholders, in terms calculated to exasperate not only an enemy but a friend—in all these ways, and more, the Garrisonians were working up a sentiment which made it impossible for the Northern States and the Southern to meet on common ground in the solution of a great problem.

It is a fact, and a fact altogether neglected by proponents of Garrison, that no considerable section of American citizenship would have borne Garrisonian insult without uniting in opposition. His own New England would have risen in as radical opposition, as it did rise in radical support, if he had spoken of its citizenship in the same unmeasured terms

²⁶ Letters of American Colonization Society, MS., W. McKenney to Wilkeson, Greensboro, N. C., Nov. 6, 1840.

²⁷ Ibid., J. C. Ehringhaus to Gurley, Elizabeth City, N. C., September 30, 1826; Cresson to Gurley, Aug. 23, 1828; *African Repository*, vol. v, p. 94.

that he used in describing Southerners. This is true because a man's a man, and not a superman. Too much has been made of the peculiarities of Southern temperament and not enough made of the peculiarities of Garrisonian abuse. Garrison thought of the South in terms of Ephraim and his Idol, and that was true in 1831 of a part of the lower South. But a truer picture of the upper South in 1831 would have been that represented by Prometheus Bound.

Garrison's abuse furnished the South with the best justification it ever had for plunging into civil war. Ultra-Abolition made a patriot of many a man who could not have fought with great earnestness to preserve the institution of slavery. Garrisonian methods made patriots of Southern opponents of slavery, for they enabled the South to stand, not only as the defender of a bad thing but also as the defender of a good thing; not only as a defender of slavery, but also of the Constitution of the United States. Colonizationists took away the strongest ground the South had to stand on in her defense of slavery, for Colonizationists admitted that the Constitution stood between them and the positively proslavery advocates. Garrisonians, by refusing fully to admit that, had a large part in the very making of their arch-enemy Calhoun. They gave him the opportunity of defending the South in the same breath with which he defended the Constitution. They assisted him powerfully in making his reputation as a great political theorist, as well as a great proslavery advocate. It may now appear that radical abolitionism was pregnant not only with influences opposed to Colonization, but also with influences opposed to emancipation.

Other counter influences should be mentioned, such as the injudicious publication of articles advocating emancipation, the belief of some slaveholders that their "people" would not be safe in the colony from the dangers of hostile tribes and that proper provision was not made for receiving them, the fear that their slaves after being liberated might escape

from the vessel before it left port, the unwillingness of many negroes to go to Liberia, the refusal of some slaveholders to encounter public criticism, the extreme sensitiveness of portions of the South, and particularly of Virginia, to any efforts made to secure aid from the Federal Government, and the widespread realization that already the Colonizationists had more applicants than their funds would permit of sending to Africa.³⁸

Indeed, there was probably not a time during the whole period herein considered when, notwithstanding the counter influences of which mention has just been made, the Society could not have enlarged greatly its operations and secured the liberation of a much larger number of slaves than were given over to it, if it had had funds sufficient to settle them. As early as 1827 the Managers were compelled to refuse passage to recently emancipated slaves in parts of Virginia, and of slaves who would be emancipated to go to the colony.³⁹ The public journal of the Society contains many evidences that Abolitionists could have secured at once the liberation of hundreds and thousands of slaves if they had been willing to contribute to the support of the Society which could get slaves for the asking when Garrison could not have bought them at any price.

The panic of 1837 was very disastrous to the enlarging opportunities of the Society. John McDonogh of Louisiana thought that in 1840 there were hardly fifty solvent men in New Orleans,⁴⁰ and that same year the treasurer of the Society was appealing to friends in the North to furnish the means without which the liberty of certain slaves could

³⁸ Letters of American Colonization Society, MS., Hunt to Gurley, Brunswick, Va., October 5, 1826; Brand to Gurley, Richmond, Va., August 20, 1827; Brand to Gurley, Richmond, Va., November 3, 1827; M. B. Blackford to Gurley, Fredericksburg, Va., August 18, 1845; McLain to Rev. N. S. Dodge, February 20, 1843, No. 677; W. M. Blackford to Gurley, Fredericksburg, Va., October 21, 1829; C. S. Carter to Gurley, Richmond, Va., December 22, 1831; *African Repository*, vol. xii, p. 89; vol. xiv, pp. 43-47.

³⁹ Minutes of Board of Managers of American Colonization Society, MS., March 26, 1827.

⁴⁰ Letters of American Colonization Society, MS., Cresson to Wilkeson, New Orleans, April 2, 1840.

not be secured. "We are trying hard," wrote McLain, "to raise the means of sending to Liberia about 40 liberated slaves, who must be sold again into slavery if not sent soon. In these circumstances we should be unfaithful to the important trusts committed to us, if we did not appeal to every friend of the colored man for help."⁴¹ Letters were sent to leading Colonizationists throughout the United States for aid in securing the liberty and transportation of slaves offered for the Colony.

In 1841 the general agent, Judge Wilkeson, thus instructed McLain who was working for the cause in the South: "Study economy and take the negro only who will go to slavery unless sent to Liberia, unless his expenses are paid."⁴² Appeals were made during this year to save from slavery and the cupidity of heirs eleven slaves in Kentucky, and at another time, eighteen slaves from the same State.⁴³ The appeal of the Colonizationists was: "We must save them"; "What shall we do? We have now no means of defraying their expenses. Let them be sold? We never could justify this to the American people." "More emigrants offer than we can raise the means of sending." In 1842 a slaveholder of Nashville, Tennessee, desired to place in the hands of the Society for emigration sixty slaves; a slaveholder living near New Orleans made an offer of eighty slaves; a lady in Virginia desired to make the same disposition of some sixty of her "people," but the Society had not the funds to fit out an expedition.⁴⁴

During that year the treasurer sent to a slaveholder the following refusal: "I wish it was in my power to inform you that the Soc. could pay the expenses of sending the family you wish to liberate. But the applications are so numerous and the Soc. so in debt, the Ex. Committee have

⁴¹ Ibid., McLain to Hubbard, December 30, 1840, No. 487; President Humphrey of Amherst, December 30, 1840, No. 490.

⁴² Ibid., Wilkeson to McLain, April 6, 1841, No. 114.

⁴³ Ibid., McLain to D. Baldwin, vol. iv, No. 1542; Theodore Frelinghuysen, August 26, 1841, No. 70.

⁴⁴ Ibid., Gurley to Jacob Gibson, February 14, 1842, No. 629; Gurley to George Barker, February 17, 1842, No. 641.

been obliged to resolve that for the present they can send out none but such as can pay their own expenses."⁴⁶ And within about three months he was appealing for \$7500.00 with which to fit out an expedition, on which one hundred and sixty-seven slaves were to go to Liberia "if we can send them," otherwise a part of them were to revert to slavery. "Oh, that our Northern friends but understood the magnitude and importance of the great work in which we are engaged."⁴⁶ But appeals to New England failed of the desired results. Mr. Garrison had declared that it was the purpose of the Colonizationists to "rivet more firmly the fetters of the slave."

To those who suppose that the only reason slaveholders could offer for continuing to hold their slaves was that they preferred to do so, it may be of value to point out some of the problems involved in the liberation by a master of his negroes; and to show that there were slaveowners in the South who despised the institution and who were glad of an opportunity to be rid of the responsibility and burden when they found an opportunity to do so with safety, as they thought, to their country. In 1827 a Mississippi slaveholder, preparing his twenty-three negroes for emigration to Liberia, wrote the Society, telling of the farming tools and carpenter's outfit he hoped to give them on their departure, and thus expressed his gratification at finding a way out of the burden of slaveholding:

I hope that it will be in the power of the Society to give them a passage early in June, that I may be enabled to wipe from my character the foulest stain with which it was ever tarnished and pluck from my bleeding conscience the most pungent sting. I had fully determined several years past to emancipate them about this time but had been much perplexed in my mind in relation to their future place of residence, until I learned that Heaven had provided an asylum in the land of their ancestors, where I had long been of opinion it was right that they should be transported and with them the seeds of civilization and Christianity to make some amends . . . for the many wrongs and outrages committed . . . by a people who styled themselves Christians for so many centuries.⁴⁷

⁴⁶ Ibid., McLain to Dr. W. S. Holcombe, August 17, 1842, No. 236.

⁴⁶ Ibid., McLain to G. W. Campbell, November 29, 1842, No. 445; Gurley to Dr. A. Proudfit, No. 448; Gurley, No. 336.

⁴⁷ Ibid., Silas Hamilton to Gurley, Adams County, Miss., December 28, 1827.

Sometimes the difficulty was in the expense involved in the preparation of the slaves for liberty, and one would be surprised to read the many evidences of real desire on the part of those masters who offered their slaves to the Society to send their negroes well prepared, well equipped, and well provisioned.⁴⁸ William Johnson, of Western Virginia, who was the owner of nine slaves, one of whom he had bought with the express purpose of freeing him with his sister, was an uneducated, poor, but sincere slaveholder for conscience sake. After making two attempts "to try to git money to send them to liberia," he appeals to the Society to relieve him of the burden.⁴⁹

In many cases the difficulty was simply one of deciding what to do with the slaves if they were to be freed. It has been seen that in most of the Southern States the laws against emancipations within the State were made more stringent and were more strictly enforced after the Garrisonian onset and the development of the cotton industry. The result was that slaveholders, no matter what they thought of the evils of slavery, could not lawfully manumit, except by transporting the manumitted to some part of the Union, or to some other place where such prohibitory laws were not in operation. Sometimes, it seems, the very consideration of the advantages of the Colonization movement led directly and immediately to the determination to emancipate, on condition of removal.⁵⁰ Sometimes the difficulty arose from the unwillingness to divide families, separating husband and wife, parents and children, one of the most repulsive aspects of the whole repulsive system of slavery.

It would not be practicable in a study of this nature to attempt a complete summary of even the most interesting instances of emancipation and transportation to the colony; but it is important to mention a number of such cases. A

⁴⁸ Ibid., A. M. Marbury to Gurley, Alexandria, Va., May 26, 1835.

⁴⁹ Ibid., Wm. Johnson to Fendall, Tyler County, Va., November 26, 1836.

⁵⁰ Ibid., McKenney, Norfolk, Va., December 27, 1832; C. W. Andrews to Gurley, Richmond, Va., February 1, 1836; C. C. Harper, Baltimore, Md., April 24, 1828.

flood of light is thereby thrown upon the inquiries: What portion of the South furnished the largest number of emancipations to the Society? What portion furnished the largest number of large single emancipations? What provisions were made for the emancipated slaves? What conditions were attached to the acts of emancipation? Did those who sent portions of their slaves to the colony express, after hearing from them, a willingness to send others? Were those emancipated chiefly the old and infirm, or were the emigrants able-bodied, valuable negroes? Up to and including 1832, among the emancipations with provision for emigration to Liberia, are the following:

A lady from near Charles Town, Virginia, liberated ten slaves; also two slaves whom she purchased because of their relation to her own. For these two she gave \$800. They were manumitted for the purpose of emigration to Africa.⁵¹ William H. Fitzhugh, a Vice-President and active member of the Colonization Society, by will liberated all his slaves, numbering about three hundred. Their liberation was to date from 1850. Upon their consent to go to Liberia, and they were to have their freedom whether or not they agreed to go to the Colony, their passage was to be paid and they were to be given fifty dollars each.⁵²

David Shriver, of Maryland, by will emancipated his thirty slaves; Colonel Smith, of Sussex County, Virginia, by will emancipated seventy or eighty, leaving about \$5000 for their transportation and settlement.⁵³ Miss Patsy Morris, of Virginia, by will emancipated her sixteen slaves, leaving \$500 for their passage to the colony. Sampson David, of Tennessee, emancipated, by will, his twenty-two slaves, and Herbert B. Elder, of Petersburg, Virginia, twenty. A Georgian liberated forty-nine, the greater part of his fortune, on condition that they should go to the colony. In

⁵¹ Carey, pp. 8-9.

⁵² Minutes of Board of Directors of American Colonization Society, M.S., January 18, 1849, p. 74.

⁵³ Carey, pp. 8-9; African Repository, vol. ii, pp. 29-30.

North Carolina alone there had been offered to the Society six hundred and fifty-two slaves.⁵⁴

✓ Mrs. Elizabeth Moore, of Kentucky, provided, by will, for the emancipation of all her slaves, about forty. ✓ Charles Henshaw, of Virginia, manumitted sixty to send them to Liberia.⁵⁵ A Mr. Funston, of Frederick County, Virginia, emancipated ten slaves, and by will provided \$1000 to cover their transportation expenses.⁵⁶ Another Virginia slaveholder emancipated one hundred and ten slaves. Another, a Methodist minister of Suffolk, Virginia, emancipated upwards of thirty, leaving several hundred dollars to be applied to their transportation.⁵⁷ A Virginia lady emancipated twenty-five, and a slaveholder of Kentucky, sixty.⁵⁸ David Bullock, of Virginia, emancipated twenty-three, the oldest not over forty years. This slaveholder inquires for the negroes as to "their expectations when they arrive, as to their immediate support, and their future chance for living, whether they will have land allotted to them, etc."⁵⁹ Among those emancipated after 1832, are the following:

The New Orleans Picayune contains this announcement: "We understand that six hundred negroes, belonging to a gentleman of this city, lately deceased, are to be liberated according to his will, provided they are willing to go to Africa, in which case ample provision is to be made for their transportation."⁶⁰ Another slaveholder was willing to emancipate sixty, if funds could be secured with which to transport them to the colony.⁶¹ John McDonogh, of New Orleans, was ready in 1842 to send eighty or eighty-five slaves, valued at \$150,000.00, well trained and an unusual acquisition. Of McDonogh's negroes, about fifty-five

⁵⁴ Carey, pp. 8-9; *African Repository*, vol. ii, p. 163; vol. iv, p. 185.

⁵⁵ *African Repository*, vol. i, pp. 191-192.

⁵⁶ *Ibid.*, vol. ii, pp. 352-353.

⁵⁷ *Ibid.*, vol. iii, p. 27.

⁵⁸ *African Repository*, vol. iv, p. 251.

⁵⁹ *Letters of American Colonization Society*, MS., D. Bullock to Gurley, Louisa, Va., September 13, 1827.

⁶⁰ *African Repository*, vol. xiv, p. 63, copied from New Orleans Picayune, February 13, 1838.

⁶¹ *African Repository*, vol. xviii, p. 80.

were adult and the rest children from six to twelve years of age. So far was the colonization mode of securing the emancipation of slaves favorably looked upon, even in Louisiana, that a New Orleans paper commented in the most favorable terms upon both the Society, Mr. McDonogh, and his philanthropic scheme of emancipating all his negroes, and upon the condition of the colony as revealed in the letters sent back to persons in the State from the negroes he had sent out. These letters abounded in expressions of thankfulness and gratitude to their former master for his generosity and liberal treatment of them.

McDonogh had worked out a plan by which the negroes were allowed to earn their own freedom, by using advantageously certain hours and days given them for that purpose by their master. It was one of the most interesting plans ever proposed for the liberation of slaves without actual expense to the owner. McDonogh found that, if the slave used well the time given to him, he could secure his own freedom within fifteen or seventeen years. This freedom he gave to those who were his own property. And although *The Liberator* and other Abolitionist papers severely criticised the plan, McDonogh was trying to recommend to the southern slaveholder a plan by which he could rid his country of slavery and at the same time do so without great loss to himself.⁶³

In 1832 Major Bibb, of Kentucky, sent thirty-two of his slaves to the colony, and the following year he tendered freedom to the remaining forty, on condition that they would emigrate.⁶⁴ This year also, Dr. James Bradley, of Georgia, manumitted about sixty negroes, who emigrated to the Colony.⁶⁵ The following year Dr. T. M. Ambler, of Virginia, emancipated about thirty, who went to the Col-

⁶³ Letters of American Colonization Society, MS., McLain, New Orleans, La., July 2, 1844; Gurley to Proudft, March 7, 1842, No. 677; *African Repository*, vol. xix, p. 48 ff.; pp. 141-142.

⁶⁴ Letters of American Colonization Society, MS., G. C. Light to Gurley, Cynthiana, Ky., June 6, 1833.

⁶⁵ Lugenbeel.

ony.⁶⁵ In 1834 Dr. John Ker, one of the most prominent Colonizationists in the Southwest, wrote asking that sixteen of a considerable number of slaves left free, on condition of their emigration, by James Green of Mississippi, be allowed passage:

I am authorized to say that they [the executors] will pay the whole expense of their emigration, and, agreeably to the will of the Testator, will furnish them with a very handsome outfit, amounting, for those over twelve years old, to from three to five hundred dollars, and somewhat less for the younger ones. . . . You will allow me to bespeak for them . . . all the attention and favor which may be necessary to their comfortable and eligible establishment in the Colony.⁶⁶

In 1836 Gurley visited Mississippi in the interest of the Society, and his report to the Managers throws an interesting light upon the attitude of that State toward emancipation, and also upon the estate of the deceased James Green, and the purpose of the principal executor in relation to the remaining slaves. Gurley was forcibly impressed with the liberality and cordiality of the Colonizationists of that State. They had contributed two thousand dollars "without my personal application to a single individual, and with my detention hardly for a day."

On Monday, I visited James Railey, Esq. (principal executor of the estate of the late James Green) at his beautiful country seat. . . . Its generous proprietor opened to me fully his mind in regard to the estate . . . with written and verbal requests that it should be applied to the *emancipation and colonization of slaves from Mississippi in Liberia*. It will be recollected, that certain slaves emancipated by Mr. Green have been sent to the colony, and Mr. Railey informs me, that their outfit and supplies and passage cost about \$7000. The trust might, in the opinion of some, be fulfilled, were \$20000 in addition, applied to the benevolent purposes of the testator, but Mr. Railey states that *it has been determined to devote \$25000 more to the objects of testator's charitable desires.*⁶⁷

Alexander Donelson of Tennessee died in 1834, emancipating his slaves by will. By the laws of the State, negroes freed within its bounds were compelled to leave or revert to slavery, unless they were by the county court permitted

⁶⁵ Ibid.

⁶⁶ Letters of American Colonization Society, MS., Ker to Gurley, Natchez, Miss., January 10, 1834.

⁶⁷ Ibid., Gurley to Fendall, June 30, 1836.

to remain. By decree of that court, Donelson's slaves were allowed to remain in the State until the time of embarkation, if they agreed to start for Liberia by January 20, 1836. The slaves were twenty in number. All were grown, and none over forty years of age. Donelson had left them all his personal property, amounting to a considerable sum. They had ample means to provide themselves with clothes, tools, and provisions. They could pay their own passage and still have money left after arriving in the colony. The son of the deceased had, by careful management, increased considerably the fund left by Donelson. He had left them together on the farm, had allowed them to continue their work, and had given them the proceeds of the crop.⁶⁸ In 1834 one hundred and nine slaves owned by Dr. Hawes, of Virginia, were liberated and transported to the Colony.⁶⁹

A Colonizationist from Hanover County, Virginia, wrote the Society in 1836 that a family of thirty slaves had been liberated in that county, on condition of their emigrating to the colony. Their passage was to be paid, and a sum sufficient for their comfortable settlement was to be given them. Another family, twenty-seven in number, had been liberated in the adjoining county. To each of the twenty-seven a legacy of one hundred and fifty dollars was left for the purpose of enabling them to settle either in some free State or in some country where they might enjoy their liberty. They had apparently decided to go to Liberia.⁷⁰ During this year also, forty-two slaves, liberated by William Foster, of Mississippi, arrived in the colony.⁷¹ In 1837 Thomas Potts, of Virginia, emancipated and sent to the colony fifty-nine negroes, paying the expense of their passage, amounting to four thousand and fifty dollars.⁷²

⁶⁸ Ibid., T. H. Fletcher to Gurley, Nashville, Tenn., August 12, 1835.

⁶⁹ Lugenbeel.

⁷⁰ Letters of American Colonization Society, MS., N. C. Crenshaw to Fendall, Hanover County, Va., July 15, 1836.

⁷¹ Sketch of the History of Liberia, MS.

⁷² Letters of American Colonization Society, MS., Potts to Fendall, Sussex Court House, Va., October 13, 1837; November 18, 1837.

In 1840 an agent of the Society for Kentucky wrote: "A gentleman in this vicinity tendered me twenty slaves lately for emigration, upon condition that they were willing to go, and we would provide them means."⁷³ The year preceding this, John Rix, of North Carolina, sent twenty slaves liberated by him to Liberia. John McPhail, whose efforts for the Society in preparing for the sailing from Norfolk of a number of expeditions were of the greatest value, reported in 1839 that:

I expect a family of fifteen probably the forerunner of a large number belonging to [a certain gentleman], if he should agree to the terms you may propose to take them out and provide for them six months after their arrival in Africa. . . . This is an affair I believe of much importance to the interest of the Society. I do not exactly know how many the gentleman owns but I am certain they amount to some hundreds; if he makes his mind up upon the subject he will send by every expedition some families. He writes to me in perfect confidence and says, "I wish nothing said of it either privately or publicly and no notice of it in the newspapers. . . ."⁷⁴

In 1842 Wm. B. Lynch, of Virginia, emancipated nineteen slaves on condition of their willingness to go to Africa. For their passage he appropriated five hundred dollars.⁷⁵

In 1844 Lieut. C. W. Tomkins offered for his sister to liberate about forty slaves if they would go to Liberia. The same year Mrs. Jane Meaux, of Kentucky, left, by will, liberty to fourteen slaves on condition that they would go to the colony. Each was to be given one hundred dollars upon agreement to go, besides being furnished with household and kitchen furniture. Of these slaves, the oldest was about thirty-five.⁷⁶

Colonel Montgomery Bell of Tennessee sent companies of manumitted slaves to the colony at various times. By 1854, he had already sent eighty-eight, and it was his purpose to continue until the whole number, some two hundred

⁷³ Ibid., Henkle to Wilkeson, Louisville, Ky., May 5, 1840.

⁷⁴ Ibid., volume of omitted letters, 1839-1842, John McPhail to Wilkeson, Norfolk, Va., November 16, 1839.

⁷⁵ Ibid., W. B. Lynch to McLain, Lynchburg, Va., November 7, 1842.

⁷⁶ Ibid., Tomkins to McLain, Beaufort, N. C., September 1, 1844; T. E. West to McLain, Nicholasville, Ky., December 7, 1844.

and fifty had been transported.⁷⁷ Colonel Bell's slaves were very valuable. For a single one of them he had refused five thousand dollars, which was offered a short while before the negro embarked for the colony. Bell was merely waiting until the funds of the Society were sufficient to send the rest of the people.⁷⁸

It will already have been observed that many acts of emancipation were incorporated in the wills of slaveholders. This was a favorite method of offering liberty to the slaves. The act of emancipation, no matter when effected, involved a radical readjustment of the affairs of an estate, and must have had much to do with the choice of this method. It may be well to consider some notable cases of slaves left free by will, in addition to those already noted. It will here appear that on a number of occasions the Society sued for the liberty of slaves. In many cases where suits were not instituted the liberty of the slaves was secured, or the possibility of their being set free investigated, by agents of the Society.⁷⁹ Sometimes they forestalled threatened or actual attempts to violate the provisions of emancipations contained in wills.⁸⁰

By the will of Dr. Bradley of Virginia in 1831, all his negroes, numbering about fifty, were to be allowed to emigrate to the colony. Their expenses were to be paid out of the proceeds of the estate. Those who were unwilling to go were to revert to slavery.⁸¹ They were of all ages, from infants to sixty years. In 1835 application was made for passage to Liberia for forty-four slaves left free by the will of Thomas Hickenbotham, of Virginia. Most of them were in the prime of life.⁸² The same year, General Black-

⁷⁷ Journal of Executive Committee of American Colonization Society, MS., June 23, 1854.

⁷⁸ Ibid., January 16, 1854; December 30, 1854.

⁷⁹ Minutes of Board of Managers of American Colonization Society, MS., August 30, 1825; April 24, 1826.

⁸⁰ Ibid., October 22, 1827.

⁸¹ Letters of American Colonization Society, MS., R. Jordan to Gurley, Monticello, Va., February 26, 1831.

⁸² Ibid., C. H. Page to Gurley, New Glasgow, Va., June 4, 1835.

burn, also of Virginia, emancipated by will his forty-six slaves on condition of their willingness to go to the colony; the expense of their transportation to be paid out of the proceeds of the estate.⁸⁸

One of the most interesting bequests of slaves to the Society was that of Captain Ross, of Mississippi. In 1834, Ross made a will bequeathing to his granddaughter a woman servant, Grace, with all her children, unless Grace should elect to go to Liberia, in which case she and her children were to be conveyed thither. The granddaughter was desired to maintain comfortably the testator's man servant, Hannibal and his sisters, Daphne, Dinah, and Rebecca. Hannibal was to receive an annuity of one hundred dollars, and each of his sisters an annuity of fifty dollars. In case they should elect to go to Liberia, there was to be given, in place of the annuities, to Hannibal five hundred dollars. Enoch, his wife Merilla, and their children were to be sent to some free State where they could be legally manumitted. To Enoch was to be given also five hundred dollars, unless he and his family should elect to go to Africa, in which case they should be conveyed thither, five hundred dollars being paid him upon his departure.

The rest of his slaves and property were to be left to Ross' daughter, Mrs. Margaret Reed, for the rest of her natural life, or until she was disposed to carry out the remaining provisions of his will, in relation to slaves and property. Upon Mrs. Reed's death, or her decision to carry out her father's design, all of the slaves of the age of twenty-one years and upwards, save those above referred to, and five others whose names were given, were to be assembled by the executors, who were to explain to them the provisions of the will and invite them to determine whether or not they desired to go to Liberia. Those who desired to go were to be conveyed thither, and those refusing to go were to be sold at auction, with the restriction that families were not to be separated. The proceeds from the

⁸⁸ Ibid., J. H. Peyton to Laurie, Staunton, Va., August 8, 1835.

sale and any other funds belonging to the testator's estate were, after the payment of expenses, to be paid into the treasury of the Colonization Society, to be applied to the transportation and maintenance of the slaves who elected to go. The total number of the slaves, when the will was made, was about one hundred and seventy.

Ross was a planter of excellent judgment. The returns from the estate were large. But the Captain, it seems, applied its great revenues to the comfort of his "people." It was estimated that the estate brought in a revenue of some \$20,000 a year. Of the slaves, Gurley wrote: "His slaves were kept disconnected from those on other plantations, and therefore constituted one great family of one hundred and seventy in number, who have been treated more like children than slaves. For industry, intelligence, and good order, none are their superiors. To render them happy appears to have been the great object of their master." Dr. John Ker, whose name appears so often in any study of the Colonization movement in Mississippi, said of Ross: "His slaves . . . felt, in a high degree, the mutual attachment which is not uncommon in the South between master and slave, and which ought to put to shame the slanders of ignorant or wicked Northern fanatics. He ardently desired to provide for their welfare and happiness after his death."

Ross died in 1836, and his daughter made a will which was intended to carry out exactly the wishes of her deceased father. By 1840, however, the provisions of the will were being earnestly contested by certain of the heirs. The latter were able to arouse sentiment in their favor throughout the State, and the fight was carried into the State Legislature in 1841 or 1842, where the result was the passage of a bill in the lower house, by which it would have been made unlawful for the slaves to be emancipated even on condition of their removal to the colony. The High Court of Errors and Appeals had already decided favorably to the validity of the will, and the attempt of the legislature was in reality an

attempt to annul an already announced decision of that court.

Dr. Ker just at this time rendered the Colonization Society the valuable service of opposing with great energy the passage of the bill when it came up for consideration in the Senate, of which he was a member. By a campaign of publicity and by great exertion he blocked this move to hold the slaves in slavery. The value of the estate in 1840, was estimated to be about \$200,000, and it was to be used for provisioning the Ross and Reed slaves in Liberia and in providing educational institutions in the colony. In 1842 the total number of slaves who were intended to be benefited by the will was upwards of three hundred. It appears that, after years of effort and vigilance, the Society won its point and secured the liberty of the slaves. Let those who doubt the sincerity of Gurley, John Ker, Captain Ross, or Rev. Zebulun Butler, during the days when the Colonization scheme was assailed by Garrisonians as a hypocritical collusion with the friends of perpetual slavery, consult references here given bearing upon the efforts both in and out of the courts to establish the Ross and Reed wills.⁸⁴

Another interesting example is that of Richard Tubman of Georgia. The law of Georgia did not permit the emancipation of slaves within the State; but Tubman tried to secure a special act of permission by making provision for a liberal legacy to several of the literary institutions of the State, if the permission to emancipate were granted. The legislature refused the request. Application was made to the Society to transport the slaves, except four old men whose mistress had consented at their request to keep them. Of the remaining forty-four none was over forty years of age. The widow of the deceased paid the negroes, the year after her husband's death, \$1000 for the crop they had

⁸⁴ *African Repository*, vol. xii, pp. 233-235; vol. xv, pp. 3-4; vol. xvi, p. 50; vol. xviii, p. 99 ff. *Letters of American Colonization Society*, MS., Gurley to Fendall, Rodney, Miss., July 22, 1836; Z. Butler to McLain, Port Gibson, January 10, 1844; Gurley to McLain, New York, July 22, 1845; Gurley to Butler, September 29, 1843, No. 228.

raised. The value of the slaves was estimated at not less than \$40,000.⁸⁵

In 1837 application was made for the transportation of thirty-five slaves belonging to William Hunton who, by will, had offered them their freedom on condition that they would go to the colony. Otherwise they were to revert to slavery.⁸⁶ In 1840 William Smart, of Virginia, left, by will, between twenty and thirty, all of his negroes, on condition that they should go to the colony.⁸⁷ During this same year, there were two other cases of emancipations in Virginia that should here be noted: James Fox liberated about fifty negroes on condition that they should go to Liberia, otherwise they were to revert to slavery;⁸⁸ and Mrs. Carter offered freedom to twenty-six on condition that they should go to the colony.⁸⁹ In Kentucky John Graham by will provided that after 1850 his slaves, fifteen in number, were to have their liberty on condition of their willingness to emigrate to the colony.⁹⁰ In 1842 Thomas Wallace, deceased, left by will fourteen slaves free on the condition of their going to the colony.⁹¹

Secretary McLain of the Society wrote to one of the Colonization agents in December, 1842: "Keep in mind the old gentleman near Nashville, Tennessee, who wants to liberate his 68 slaves before he dies to keep them out of the hands of his only heir who is opposed to their liberation. The Old man is in feeble health—he is poor and cannot defray their expenses. About \$3000 will carry them to the colony and support them six months."⁹² In 1843 Thomas Lindsay, of Missouri, emancipated by will twenty-one slaves

⁸⁵ Letters of American Colonization Society, MS., Wm. Y. Allen to Gurley, Augusta, Ga., December 29, 1836.

⁸⁶ *Ibid.*, John Marr to Mercer, Warrenton, Va., October 23, 1837.

⁸⁷ *Ibid.*, Brand to Wilkeson, Richmond, Va., August 18, 1840.

⁸⁸ *Ibid.*, M. B. Blackford to Wilkeson, Fredericksburg, Va., September 16, 1840.

⁸⁹ *Ibid.*, F. M. Bristow to Wilkeson, Elkton, Ky., November 24, 1840.

⁹⁰ *Ibid.*, L. W. Andey, Flemingsburg, Ky., September, 1842.

⁹¹ *Ibid.*, McLain to Dodge, December 27, 1842, No. 516; McLain to Dodge, October 27, 1842, No. 342.

on condition of their emigration to Liberia; and in Virginia, Hardenia M. Burnley emancipated by will the same number, their transportation, outfit, clothing and maintenance in the colony for six months being provided for out of the estate.⁹³

One of the most interesting cases of emancipation by will was that of Mr. Hooe of Virginia in 1845. Hooe provided for the emancipation of his two hundred slaves in Virginia and one hundred and fifty-eight in Mississippi and Alabama. Property sufficient to provide for their transportation was left to the Society, and the supervision of the execution of the will was placed directly in Gurley's hands as an executor. Gurley's comment was: ". . . so much depends on examples like that of Mr. Hooe as to the prospect of future emancipations, that special efforts should be made that the humane purpose contemplated may be fully realized." There was considerable probability that that portion of the will directing the emancipation of those slaves who were in Mississippi and Alabama would be contested. Gurley advised as to these, "to ascertain, as fully as possible, whether it is possible to institute any process, by which their case can be brought before the courts of the United States. . . . The executors are solemnly bound to neglect no possible legal means of securing the freedom of those slaves, and for one, I wish any measure, even if unpromising, adopted."⁹⁴

By will of Stephen Henderson of Louisiana, his slaves, five or six hundred in number, were to be emancipated for the purpose of emigration to the colony. The first ten, chosen by lot, were to go within five years after Henderson's death; after ten years, twenty more were to go; and after twenty-five years the remainder. The will was contested but was upheld by the Supreme Court of Louisiana.⁹⁵

⁹³ Ibid., G. C. Sibley to Gurley, Linden-Wood, Missouri, July 15, 1843; J. O. Steger to McLain, Richmond, Va., December 11, 1843.

⁹⁴ Ibid., Wm. Coppinger to McLain, Philadelphia, Pa., July 22, 1845; Gurley to McLain, New York, August 12, 1845, October 28, 1845.

⁹⁵ New Orleans Commercial Bulletin, August 15, 1845.

Besides these acts of emancipation of slaves for the colony and these bequests of money and of slaves, the records of the Society contain many interesting letters of inquiry. Many slaveholders offered the Society their slaves when it would be ready to take them. Many others wrote for advice as to the disposition of the slaves, advice which Garrisonians were denied the privilege of giving. The real sacrifice some slaveholders were willing to make for the sake of emancipating their slaves it set forth in these letters. The care with which they prepare the slave for the time when he must depend upon his own efforts is also evident. In short, the Society was a sort of clearing house where the views of moderate Southerners and moderate Northerners were exchanged, and where the spirit of emancipation worked silently but mightily. Several examples of letters of this character will suffice.

Rev. Thomas P. Hunt of Richmond, Virginia, desired to emancipate his twenty slaves, but was unable to provide funds sufficient for their transportation. He proposed that he be accredited as an agent in order to secure the funds necessary for their transportation to the colony.⁹⁶ Mrs. Barbie of Kentucky was perplexed as to the disposition of five or six slaves which she had not yet inherited, but which were to fall to her. She hoped they might be transported to the colony as soon after they came into her possession as possible.⁹⁷ A South Carolinian wrote for advice as to the disposition of his negroes, twenty-five in number. The act of emancipation would leave him a bare competency the rest of his life and he was consequently unable to bear the expense of transportation.⁹⁸

A typical inquiry was that sent from Fincastle, Virginia, in 1832: "I have from fifteen to twenty negroes I wish to emancipate. Will your Society receive and transport them

⁹⁶ Minutes of Board of Managers of American Colonization Society, MS., August 14, 1826.

⁹⁷ Letters of American Colonization Society, MS., J. C. Crane to Gurley, Richmond, Va., October 26, 1826.

⁹⁸ Ibid., W. H. Robbins, Cheraw, S. C., October 12, 1827.

to Liberia?" or: "I have for a considerable time past determined to emancipate my slaves if such facilities would be afforded them (by the Society of which you are Agent) in getting off to the colony of Liberia, as are necessary and proper for their accommodation."⁹⁹ The slaves are valued at \$3500.00. A Colonizationist from Lynchburg, Virginia, reported four groups of slaves held ready for manumission whenever the first opportunity offered to send them to Liberia.¹⁰⁰

A citizen of Missouri desired to emancipate four slaves, three of whom he bought for the express purpose of emancipating them as soon as they had refunded to him, in labor, the amount expended in their purchase. Already he had executed to them deeds of emancipation on condition of their willingness to go to the colony.¹⁰¹ A South Carolinian offered his thirteen negroes to the Society to be taken to Liberia. "He has long had it in his heart to do this; but he has not known in what way to effect it, and has requested me to open a correspondence with the Society. . . . Neither the old man nor his wife can die in peace without doing all they can to place their servants in a condition where they may enjoy liberty." The Society was to be given three hundred dollars toward the cost of transportation, and each negro man was to have one hundred dollars and each woman fifty dollars.¹⁰²

In 1843 William B. Lynch, of Virginia, sent off his eighteen slaves for Liberia. Lynch had proposed to take them to the Northwestern States to enjoy their liberty; but after a visit of inquiry, he concluded that to enjoy an equal opportunity and real freedom, they must be removed to the colony. Upon their leaving for Liberia he paid five hundred

⁹⁹ Ibid., G. Terrill to Gurley, Fincastle, Va., September 10, 1832; T. L. Leftwich, Liberty, Va., Sept. 14, 1832.

¹⁰⁰ Ibid., W. M. Rives, Lynchburg Va., October 16, 1832.

¹⁰¹ Ibid., John Conway to Gurley, Bonhomme, Mo., November 25, 1837.

¹⁰² Ibid., B. Gildersleeve to Gurley, Charleston, S. C., April 7, 1841.

dollars towards the cost of transportation.¹⁰³ One of those choice Colonization spirits among the women of Virginia was Mrs. Mary B. Blackford. She had prepared Abram to be sent to the colony, and her care for him is of interest:

Giving him his freedom and outfit is as much as I can do being limited in my funds. My brother writes me he is very apt in learning any trade he is put to and suggests his being put to learn the carpenter's trade before he goes, but, I fear if I kept him here for the purpose, something would occur to prevent his having his freedom. . . . my heart is greatly set on this plan. . . . Pray ask that he may be cared for during the fever; if he were to die I should feel a heavy responsibility on me.¹⁰⁴

Joseph H. Wilson of Kentucky was anxious that his twenty-seven slaves should have a passage to Liberia. They were valued at \$12,000; and besides emancipating them, he proposed to give them \$1000 or \$1200. The Society's agent thus commented upon Wilson's treatment of his negroes: "He has no children and makes his slaves the object of his kindness. . . . the only evil I can see is that when they set up for themselves, as free people, . . . they will feel the loss of the care of their present owners," for he here referred also to two other families of slaves whose masters desired to emancipate them.¹⁰⁵ Mrs. Mary B. Blackford, writing in behalf of a friend who desired to emancipate and send to the colony her six slaves, commented on the particular case:

She will do her utmost in sending these people away, or rather in giving them their freedom, and I know it is entirely out of her power to furnish them with necessary funds. If some who judge slaveholders so hardly, knew all that I do of the conscientiousness, generous self-denial, insurmountable obstacles, which they would so gladly do away with, how differently they would regard them. In Virginia the owner is almost as much to be pitied as the slave.¹⁰⁶

¹⁰³ *African Repository*, vol. xix, p. 201.

¹⁰⁴ Letters of American Colonization Society, MS., M. B. Blackford to Gurley, Fredericksburg, Va., September 2, 1843.

¹⁰⁵ *Ibid.*, Pinney to McLain, Bardsville, June 10, 1844.

¹⁰⁶ *Ibid.*, M. B. Blackford to McLain, Mt. Airy, Va., February 2, 1845; J. W. Norwood to Gurley, Hillsborough, N. C., 1826; Miss Judith Blackburn to Gurley, Mount-Vernon, March 29, 1831; J. L. Crawford to Gurley, Danville, Ky., February 27, 1842; G. W. McPhail to McLain, Fredericksburg, Va., November 11, 1845; *African Repository*, vol. vii, pp. 271-272.

It will be noted that no references have been made to slaves offered from Maryland, although that State was one of the first in the number offered for settlement in Africa. It will be remembered that very early in the thirties the Maryland Society assumed an independent attitude toward the parent Society. Thereafter the slaves offered were offered directly to the State organization, and no record therefore appears on the official documents of the Society.¹⁰⁷

When an expedition was preparing to leave New Orleans the latter part of the year 1848, there were four hundred and seventy-nine negroes who had applied for passage to the colony. Of these, two hundred were those from the Ross estate, to revert to slavery if they were not removed by the end of January.¹⁰⁸

The problem was not the difficulty in securing the emancipation of slaves or the want of inclination to encourage emancipation, but the want of funds to carry out their benevolent designs. If the Society had had the means it could have secured thousands more of the slaves of the South and could have made them freemen; and those who measure the work and influence of that organization by the actual number of slaves transported have gotten a very inadequate conception of its influence or its usefulness. The need of funds in the sending out of the expedition just spoken of is but one of many examples that might be presented to show the inability, for want of funds, to meet its opportunities. If the States north of Mason and Dixon's line had offered as much money in cash as the States south of that line offered in slaves, leaving out of account the many thousands of dollars contributed in cash to the treasury of the Society from the slaveholding States themselves,

¹⁰⁷ For reports of expeditions sent out to the colony, see *Minutes of Board of Managers of American Colonization Society*, MS., February 9, 1829; *Journal of Executive Committee of American Colonization Society*, MS., November 28, 1848; March 15, 1851; April 19, 1851; November 7, 1851; December 16, 1852; November 18, 1853; January 16, 1854; December 20, 1854; etc.

¹⁰⁸ *Journal of Executive Committee of American Colonization Society*, MS., November 28, 1848.

the statistics of emancipations would be written in quite different figures. Or if the influence of the Society were even measured by the number of slaves offered to it, rather than by the limited number it was able to transport, those figures would still require a radical revision.

But taking the figures as they are: by 1830 over two hundred of the slaves freed and sent out to Liberia had been emancipated by their masters for the express purpose of emigration to the colony.¹⁰⁹ In 1841 Gurley wrote that the Society "has secured the voluntary manumission of slaves, (about 2000) in value (viewed as property) nearly, if not quite, equal to the whole amount of funds given for the establishment of Liberia; while its influence to prepare for future emancipations it were difficult to estimate."¹¹⁰ Judge Wilkeson estimated the proportion of emancipated slaves to free negroes taken to the colony as more than one for one.¹¹¹ By the beginning of 1855, about 3600 slaves had been actually emancipated with a view to their settlement in Liberia.¹¹² By the time the Society was fifty years old (1867) the number of slaves actually emancipated and sent to the colony was about 6000.¹¹³

¹⁰⁹ A Few Facts, published by American Colonization Society, MS., 1830.

¹¹⁰ 27th Cong., 3d sess., H. Rept. No. 283, p. 1023.

¹¹¹ Minutes of Board of Directors of American Colonization Society, MS., July 20, 1841.

¹¹² Ibid., January 16, 1855.

¹¹³ Half-Century Memorial, American Colonization Society, 1867.

**A LIST OF SLAVES EMANCIPATED OR OFFERED FOR EMANCIPATION FOR
EMIGRATION TO LIBERIAN COLONY, 1825-1835, INCLUSIVE.**

The list given below must not be taken as official. It is a compilation collected from various sources. Doubtless it is very incomplete. It will be of value, however, as showing the distribution of offered emancipations and the number of slaves offered by individual slaveholders.

Year.	State.	Slaves Offered by	Number Offered.
1825	Va.	Name not given	100
"	"	David Minge	80 (approximately)
"	"	Charles Henshaw	60
"	"	N. C. Crenshaw	65
"	"	Rev. Cave Jones	2
"	"	Rev. John Paxton	11
"	Ky.	Miss Elizabeth Moore	40 (approximately)
"	N. C.	David Patterson	11
"	Md.	— Dickinson	1
"	"	Name not given	20
"	?	Rev. Fletcher Andrew	30
1826	Va.	Colonel Smith	70 or 80
"	"	H. B. Elder	20
"	"	Henry Robertson	7
"	"	Miss Patsy Morris	16
"	"	A clergyman	30 (approximately)
"	"	A lady	12 (approximately)
"	Md.	David Shriver	30
"	Tenn.	Sampson David	23
"	O.	Rev. S. D. Hoge	1
1827	Va.	— Funston	10
"	"	— Ward	110
"	"	Rev. Robert Cox	30 (approximately)
"	"	Col. David Bullock	23
"	Md.	Daniel Murray	1
"	"	J. J. Merrick	3
"	"	Name not given	2
"	N. C.	William Fletcher	12
"	S. C.	— M'Dearmid	26
"	?	Capt. J. D. Henley	1
1828	Va.	Name not given	17
"	"	Name not given	8
"	"	Name not given	5
"	"	Name not given	20 (approximately)
"	Ky.	Name not given	60 (approximately)
"	Ga.	Name not given	43
1829	Va.	Rev. T. P. Hunt	18
"	"	Edward Colston	6
"	Md.	Miss Margaret Mercer	15
"	"	J. L. Smith	12
"	"	Governor Ridgeley	400 (this case not certain)
1830	Va.	Dr. Tilden	6
"	"	— Pretlow	3
"	"	G. W. Holcomb	5
"	"	Name not given	? (one family)

Year.	State.	Slaves Offered by	Number Offered.
1830	Va.	A lady	50
"	"	A lady	12
"	"	Name not given	? (all his slave)
"	"	W. H. Fitzhugh	300 (approximate)
"	"	Miss Blackburn	12
"	"	Miss Van Meter	7
"	"	Name not given	7
"	"	John Morton	2
"	"	Noah Maund	9
"	"	John Matthews	6
"	"	?	2
"	"	John B. Carr	10
"	"	Name not given	6
"	"	A lady	50
"	"	A lady	1
"	"	Mrs. Merry	4
"	"	Mrs Ann Tinsley	2
"	Md.	F. S. Anderson	6
"	"	Name not given	20
"	"	Mr. Bell	2
"	"	J. Hughes	1
"	Ga.	Joel Early	30
"	"	Name not given	1
"	"	C. Bolton	9
"	Tenn.	Judge Wm. Brown	15
"	"	Rev. Williamson	23
"	Ky.	Richard Bibb	60
"	"	J. A. Jacobs	1
"	"	W. L. Breckenridge	14
"	Miss.	Dr. Silas Hamilton	22
"	?	Francis Kinlock	1
"	?	Richard Holmes	30
"	?	J. B. Blackburn	12
1831	Va.	H. Robinson	1
"	"	Dr. Matthews	1
"	"	Rev. John Stockdell	31
"	"	William Johnson	12
"	"	Name not given	6
"	"	Name not given	3
"	Md.	Thomas Davis	4
"	N. C.	— Williams	8
"	"	Gen. Jacobs	7
"	Ky.	L. W. Green	1
"	"	Lee White	?
"	Tenn.	Name not given	4
"	Miss.	Mrs. E. Greenfield	18
1832	Va.	Dr. Wilson	3
"	"	George Reynolds	7
"	"	T. O. Taylor	9
"	"	Mrs. A. R. Page	15
"	"	Mrs. A. R. Page	14
"	"	Rev. M. B. Cox	1
"	"	Name not given	13
"	"	Two gentlemen	11

Year.	State.	Slaves Offered by	Number Offered.
1832	Va.	Name not given	17 (approximately)
"	"	Name not given	14
"	"	A lady	1
"	N. C.	J. A. Gray	14
"	"	Name not given	7
"	"	A lady	4
"	S. C.	Mr. Stewart	14
"	Ga.	Dr. Bradley	46
"	Tenn.	Name not given	8
1833	Va.	Dr. Aylett Hawes	109
"	"	Theophilus Gamble	2
"	"	Robert Coiner	2
"	"	Silas Henton	2
"	"	Rev. Hanks	9
"	Md.	Col. Wm. Jones	13
"	Ky.	Wm. O. Dudley	12
"	"	Cyrus Walker	6
"	"	Mrs. Mary Wycliffe	7
"	"	Rev. J. D. Paxton	5
"	"	A. M. and D. Caldwell	4
"	"	Mrs. Powell	3
"	"	Rev. J. C. Young	2
"	"	Heirs of Dr. A. Todd	4
"	"	Jonathan Becroft	3
"	"	Rev. D. Blackburn	2
"	"	James Hood	3
"	"	Dr. B. Roberts	1
"	"	John Holson	1
"	"	A. J. Alexander	1
"	Tenn.	George Ewing	10
"	"	Dr. McGehee	1
"	"	Robert Caldwell	1
"	Ga.	Rev. Ripley	14
"	O.	Benj. Johnson	6
"	Ill.	Cyrus Edwards	1
1834	Va.	Johnson Cleveland	?
"	N. C.	Name not given	4
"	Miss.	Name not given	19
"	Ga.	Name not given	1
1835	Va.	Isaac Noves	25
"	"	Thos. Higginbotham	50
"	"	Name not given	23
"	"	Name not given	7
"	"	Rev. J. M. Brown	1
"	"	— Dawson	50
"	"	Gen. Blackburn	50
"	"	James Ogden	5
"	"	Name not given	? (several)
"	"	Miss Martha Walker	16
"	"	Mrs. A. R. Page	4
"	"	J. T. Atkinson	? (several)
"	"	— Weaver	25
"	D. C.	Name not given	1
"	Tenn.	Rev. F. A. Ross	21

Year.	State.	Slaves Offered by	Numbered.
1835	Tenn.	Name not given	20
"	"	Alexander Donelson	20
"	"	Name not given	20
"	Ga.	Name not given	1
"	"	Name not given	8
"	La.	H. M. Childers	30
"	Miss.	Name not given	20
"	"	William Foster	21
"	"	— Brazile	7 (four families)
"	"	Mr. Randolph	21
"	"	Name not given	150
"	?	Name not given	4
Total approximately			3,300

CHAPTER V

COLONIZATION AND THE AFRICAN SLAVE TRADE

The American Colonization Society was organized in 1817. Its active opposition to the African Slave Trade began that same year, and did not end until the last slaver had been driven from the African Coast. Indeed, within two weeks of the first election of officers of the Society, a memorial was presented to Congress, praying that body to bestir itself to put an end to the traffic.¹ The following year a similar memorial was presented. It was the Colonizationist leader, Charles Fenton Mercer, who secured the passage of the Anti-Slave Trade Act of March 3rd, 1819, and the passage of that act is in large measure due to the efforts of the Colonization Society.² By the terms of the act, Africans illegally taken from their native land and recaptured by the authorities of the United States Government were to be returned to the coast of Africa. It provided, further, for the appointment of agents of the United States to look after such recaptured slaves upon their return.

President Monroe, who construed very liberally the terms of the Act, cooperated with the Society, sending agents and ships, and selecting as the location for the point of resettlement of returned natives the same portion of the African coast as that occupied by the Society. In short, he so construed the act as to make the government a partner in the efforts of the Colonizationists, though the government confined its cooperation to the purposes set forth in the Act, the selection of territory as an asylum for recaptured Africans. It was under this unofficial understanding between

¹ *African Repository*, vol. xviii, p. 129 ff.

² *Ibid.*, vol. xv, p. 300.

the government and the Society that Mills and Burgess were sent out to explore the coast and recommend a point for the settlement. In his report Burgess—for Mills had died before reaching America—called attention to the destruction caused by the slave trade, and recommended as the most important objects the Society could keep in mind, from the point of view of its influence upon Africa: (1) the suppression of the slave trade, and (2) the elevation of the natives.³

In 1820 the Society, in a memorial, urged upon Congress the need of an agreement among the maritime powers "which shall leave no shelter to those who deserve to be considered as the common enemies of mankind."⁴ The committee to which the memorial was referred reported a bill which contained a provision declaring the slave trade to be piracy. Again, in 1822, the same body was memorialized to take further measures in opposition to the slave trade, and was advised that colonization on the west African coast by civilized powers, was one of the most effective remedies for that trade. Late in February, 1823, Mercer secured a unanimous vote in the House declaring slave traders pirates.⁵

Indeed, the birth of that settlement which, before the century was half passed, was to become the Republic of Liberia, must be considered the result of the cooperation of the United States Government and the group of colonization philanthropists. The first endeavored to establish an asylum for recaptured Africans. The second hoped to establish a home for those free negroes from America who desired to be free not only from physical but from mental

³ *Origin, Constitution, and Proceedings of American Colonization Society, MS.*, vol. i, p. 33 ff.

⁴ *African Repository*, vol. xviii, p. 129 ff.; *Origin, Constitution, and Proceedings of American Colonization Society, MS.*, vol. i, pp. 116-117.

⁵ *African Repository*, vol. xviii, p. 129 ff.; *Minutes of Board of Managers of American Colonization Society, MS.*, March 4, 1819, Dec. 10, 1819; *Origin, Constitution, and Proceedings of American Colonization Society, MS.*, vol. i, p. 123 ff.

slavery, for nowhere in the United States was the negro really free in 1820; for those slaves whose masters, under the influence of moral suasion, might desire to emancipate; and to establish a colony which would close that part of the African coast to the trader in West Africa negroes. The first direct and tangible steps taken in the colonization enterprise were taken by the Government rather than by the Society. The first vessel sent to the African coast was chartered and paid for by the Government. The first agents received salaries from the government, and the Society was backed by the appropriation of \$100,000 contained in the Act of 1819.⁶

Already by 1826 the colony had become so effective a barrier to the slave-trade that a French trader threatened to fit out a piratical expedition and make war on the colony for its interference with his business.⁷ In 1827 at the annual meeting of the Society, the powers of Europe and America were called upon to adopt further restrictive measures against an apparently increasing trade. Mercer there called attention to the fact that in 1824 two hundred and eighteen slave vessels had carried away from their homes 120,000 victims. He wished the time to come when the trade would be stamped with "the seal of indelible infamy."⁸ At this time Dr. William Thornton, doubtless with the object of making the colony an effective barrier against the trade, was urging the Society to obtain territory for a thousand miles along the coast, even if the width of the territory was not more than a single mile.⁹

Certainly those Americans who were fighting the traffic could have asked for no more effective or energetic colonial agent than was now in the colony, Jehudi Ashmun. Under his administration and, indeed, largely due to his exertion,

⁶ 27th Cong., 3d sess., H. Rept. No. 283, pp. 247-249.

⁷ Minutes of Board of Managers of American Colonization Society, MS., May 23, 1826.

⁸ African Repository, vol. ii, pp. 357-358.

⁹ Letters of American Colonization Society, MS., Thornton to Gurley, April 11, 1827.

the slave trade had ceased it seemed along the hundred miles of coast over which the Liberian settlers, not over 1200 souls in 1828, assumed jurisdiction. Rev. Leonard Bacon, in his eulogy upon Ashmun in 1828, declared of Cape Montserado that, while a few years ago it was "literally consecrated to the devil" and cursed as a port of entry for the unspeakable slave ship, at the time of Ashmun's death "for a hundred miles no slave trader dares to spread his canvas."¹⁰

Dr. Randall went out as colonial agent upon the death of Mr. Ashmun. He urged the building and improving of fortifications in the colony in order that it might be effective in its fight against the slave trader. He recommended that a government vessel should cruise for some months along the Liberian coast and watch the movements of the trader. Officers of the Society in this country called upon the President and Secretary of the Navy in order to secure action upon the agent's request.¹¹ The official effort was seconded by the Philadelphia Quaker, Elliot Cresson, who wrote: "I wish as our friend Key has influence with Old Hickory, thee would occasionally hint to him the advantage which we might derive, from certain welltimed suggestion, such as keeping a sharp lookout on the African Coast by a swift cruiser—or if possible making her a *packet* on her outward voyage."¹²

During the years 1830-1839 the Society was too busy trying to make its resources meet its expenditures and trying to take care of the negroes offered to it, or settled in its colony, or meeting the furious opposition of the Garrisonians, to continue its direct efforts toward the abolition of the slave trade; and in 1839 the general agent reported an alarming increase in the number of African victims taken away from the very vicinity of the colony. The influence of that trade had involved the neighboring tribes in a war which endan-

¹⁰ L. Bacon, Funeral Oration on Jehudi Ashmun, New Haven, Conn., 1828.

¹¹ Minutes of Board of Managers of American Colonization Society, MS., April 13, 1829.

¹² Letters of American Colonization Society, MS., Cresson to Gurley, Philadelphia, Pa., December 7, 1829.

gered the peace of the colony, and Wilkeson pressed the matter before the Secretary of the Navy.¹³

When the Society was reorganized in 1839 there were sent to the colonial governor, Thomas Buchanan, positive instructions urging the passage of a law forbidding "any communication between the citizens of Liberia and the slave traders," and punishing Liberian citizens violating the law "in the same manner as are citizens or subjects of any civilized State, who, are guilty of dealing with or succoring an enemy in time of war." They urged the death penalty for any participation by a Liberian in the business of the trader. The reason for these strict instructions will be understood when it is stated that there were some—there appears no evidence that many were guilty of it—among the Liberians who had themselves been redeemed from the chains of slavery, who were actively engaged in assisting the slave trader; and the Society felt that the whole colonization scheme was jeopardized by such conduct. Indeed, Judge Wilkeson thought that the strongest tie that bound many persons to the colonization cause was their belief that it was the only hope of putting an end to a very unpopular business. Wilkeson commented: "It was natural to suppose that those who had returned to the land of their fathers . . . would urge increasing war against this system of cruelty so long practiced upon their brethren." He thought that if it became known publicly that colonists had aided the slavers, "the colonies would be denounced and execrated from one end of the Union to the other."¹⁴

The new Governor was another Ashmun in his hatred of the slaver and his energy in routing him from the neighborhood of the colony. During the first year of his administration he brought about the capture of a slaving ship carrying the flag of the United States and sent her to America for trial. She was the schooner *Euphrates*.¹⁵ He further

¹³ Ibid., Wilkeson to Secretary of the Navy, February 12, 1839.

¹⁴ Journal of Executive Committee of American Colonization Society, MS., July 25, 1839.

¹⁵ African Repository, vol. xvii, pp. 246-247.

went boldly out with a company of colonists and captured out of their prisons a number of native Africans who were held in waiting for the arrival of the next slaver.¹⁶

There was not a little difference of opinion as to the most effective means of abolishing the trade. There were those who thought that it would automatically cease as slavery was abolished in the civilized nations that still endured it. There were others who supposed that the iniquity would never be suppressed until the maritime powers jointly and constantly patrolled the waters along the west African coast. But in the early forties the predominating view, it seems, was that the planting of colonies along the west coast would make impossible a traffic between the slave traders and the natives of the interior, and that such colonies, planted by the civilized powers, presented the only efficient remedy for that traffic.

Thomas Foxwell Buxton, who had been so much interested in the abolition of slavery in the West Indies, himself believed that that very abolition had stimulated a disguised form of the slave trade with that colony. The recently emancipated negroes of those Islands refused to work, and the result was the importation of so-called free negro labor from the African coast. Those imported were, many of them, either stolen outright or brought in ignorance to the West Indies, and the result was the legitimating of what had before been illegal.¹⁷ This was also Perry's view.¹⁸ Buxton believed that the only satisfactory remedy was the establishment along the coast of civilized colonies which would not endure the slave trade within their jurisdictions and which would provide an effective barrier between those who operated slave vessels along the coast and those within the interior who were willing to sell their fellow Africans.

In this view the Colonizationists of America heartily concurred.¹⁹ Indeed they had had a practical verification of

¹⁶ For an interesting account of the expedition see *African Repository*, vol. xv, pp. 277-282.

¹⁷ Sir T. F. Buxton, *The African Slave Trade and Its Remedy*, passim; *London Quarterly Review*, March, 1839.

¹⁸ *African Repository*, vol. xvii, pp. 85-86.

¹⁹ *Ibid.*, vol. xvii, pp. 246-247.

the value of this method. Bassa Cove, one of the Liberian settlements, had once been the seat of the slave trade. From five to six thousand natives had been packed into slave vessels and taken from that point annually; after the settlement of that point by the Colonizationists the trade was completely broken up. Cape Montserado itself had once been a depot for the detention of captured natives. Slavers touched there and carried away annually from two to three thousand native Africans into slavery. After the settlement of the cape and its government by the Colonizationists the slave trade ceased.²⁰

There is abundant evidence to the value of the colony as a contributor to the suppression of the slave trade. In April, 1842, Secretary of State Webster made inquiries of Captains Charles H. Bell and John S. Paine, both of whom had seen service along the west African coast and were familiar with the influence exerted by the colony of Liberia, as to the length of coast along which the trade was carried on. Those officers replied that the distance from the northernmost to the southernmost points along the coast, where the slave trader put in for slaves was 3600 miles, but that the influence of the British, French, and especially the American settlements was so directly hostile to, and effective against, the trade, that from this extent of coast should be subtracted 600 miles, leaving only 3000 miles of coast along which the slavers actually carried on their work.²¹ Captain Arabin, of Her Majesty's Navy, testified: "Wherever the influence of Liberia extends, the slave trade has been abandoned by the natives, and the peaceful pursuits of legitimate commerce established in its place."²²

M. C. Perry, who had commanded the United States Naval forces on the west coast of Africa, wrote in 1844: "So far as the influence of the colonists has extended, it has been

²⁰ Ibid., vol. xvii, p. 248.

²¹ 27th Cong., 3d sess., H. Rept., No. 283, pp. 768-769.

²² African Repository, vol. xvii, p. 331, Nov., 1841.

exerted to suppress the slave trade, and their endeavors in this respect have been eminently successful; and it is by planting these settlements . . . along the whole extent of coasts, from Cape Verde to Benguela, that the exportation of slaves will be most effectually prevented." He favored appropriations from Congress in aid of the Society for this purpose as well as others.²³ Two years later he declared: "It is useless to talk of destroying this vile traffic in any other way than by belting the whole coast with Christian settlements, unless the European powers should follow the example of the United States and declare it to be piracy, and then faithfully enforce the law," and he thought that at that time the only powers that were in earnest about the destruction of the trade were the United States and Great Britain.²⁴

Not only did the colonial governors effectively prohibit the slave trade within the jurisdiction of the colony, but they also provided needed information as to the points along the coast at which the trade was still carried on. Upon several occasions reports were received that certain points along the coast and surrounded by the territory of the colony—for it was years before the colony obtained exclusive jurisdiction over a continuous line of coast—were used as centres of the trade. The Society almost invariably set at once to work to purchase these points.²⁵ Thousands of dollars were given by Americans for this specific purpose. Governor Roberts in 1843 notified the Society that at a single depot, between Cape Mount and Cape Palmas, both surrounded by Liberian territory, four hundred slaves had but recently been taken away in slavers. At once the question of the purchase of that territory was agitated by the Directors of the Society.²⁶

²³ *African Repository*, June, 1844, vol. xx, pp. 167-168; Letter of M. C. Perry to David Henshaw, Secretary of the Navy, January 4, 1844.

²⁴ *African Repository*, vol. xxii, pp. 85-86, March, 1846.

²⁵ Letters of American Colonization Society, MS., Gurley to Rev. S. Cornelius, July 28, 1843.

²⁶ *Ibid.*, Gurley to Cornelius, July 28, 1843; *Journal of Board of Directors of American Colonization Society*, MS., vol. iv, p. 24.

By 1845 there were, it seems, but two points along a coast line of seven hundred miles, over which the influence of the colony extended, where the slavers continued to frequent, and they were points which the Society had not had the means to purchase. It should be remembered that twenty years before the whole of that coast line was dotted with depots, slave factories as they were called, where the slaver came to take away hundreds of slaves in a single vessel, scores of the human cargo perishing before the vessel had reached its destination, while there were, in 1845, but two depots that remained, and they without the limits of the Colony. It was probably a fair estimate that the Society made, that it was saving every year, or was the leading instrument in saving from perpetual bondage in some other land or from a horrible death on a slave ship, 20,000 Africans.²⁷

If one may venture to estimate the number of native Africans saved from either of these alternatives by the influence of the American Colonization Society, would it be too much to say that not fewer than 100,000 negroes were in this way saved to freedom? When the Garrisonian asked the Colonizationist: "What are you doing to bring about the *immediate* emancipation of the slaves in the United States?" the Colonizationist could and did reply: "We are doing all we can to secure the entire abolition of slavery in the United States as soon as may be consistent with constitutional guarantees, peace, and the preservation of the American Union. What are you doing to bring about the *immediate* abolition of the slave trade?" And the Garrisonian was silent on the efforts of the Society to bring to a speedy end that outlawed and inhuman traffic.

For many years there was active cooperation between the Society and the Government in relation to this trade. In 1844 the Society kept an agent in Liberia whose duty it was to deliver parcels and packages sent to the American squadron patrolling the African coast waters. Also the Govern-

²⁷ African Repository, May, 1845, vol. xxi, p. 145 ff.

ment was allowed to land, free of duty, at the port of Monrovia, all provisions, stores, and supplies used by the squadron.²⁸ It also received hundred of recaptured Africans and settled them in Liberia. The largest single cargo of slaves thus sent to Liberia was that sent in the "Pons" in 1846, for whose support the Government paid the Society thirty-odd thousand dollars.²⁹

The Society did not hesitate to investigate cases in which citizens of New York or the New England States were reported to be engaged in operating vessels which were actively engaged in the slave trade.³⁰ And when there was talk of abrogating that part of the Webster-Ashburton treaty which related to the patrolling of the waters along the African coast, and at other times when there was some discussion of the advisability of either withdrawing or diminishing the size of the squadron kept in those waters, the leaders of the Society consistently protested against such withdrawal or diminution.³¹

It will be of interest to note the opinion of Secretary of State Everett in 1853. Everett said:

Wherever a colony is established on the coast of Africa under the direction of a Christian power in Europe or America, there the slave trade disappears; not merely from the coast of the colony, but from the whole interior of the country which found an outlet at any point on the coast. . . . The last slave mart in that region, the Gallinas, has, within a short time, I believe, come within the jurisdiction of the American colony of Liberia. Now, along that whole line of coast . . . from every port and every harbor of which the foreign slave trade was carried on—within the memory of man, it has entirely disappeared. . . . And what career is there opened for any colored man in Europe or America, more praiseworthy, more inviting than thus to form as it were, in his own person a portion

²⁸ Journal of Executive Committee of American Colonization Society, MS., June 6, 1844, pp. 381-383.

²⁹ Ibid., May 1, 1851, p. 187; Minutes of Board of Directors of American Colonization Society, MS., January 16, 1861, pp. 367-368; January 22, 1862, p. 380.

³⁰ Letters of American Colonization Society, MS., Tracy to McLain, Boston, April 23, 1846; Minutes of Board of Directors of American Colonization Society, MS., January 18, 1855, p. 218.

³¹ Minutes of Board of Directors of American Colonization Society, MS., January 20, 1853, p. 120; January 18, 1855, pp. 213-214.

of that living cordon stretching along the coast and barring its whole extent from the approaches of this traffic.⁸²

Professor Hart, commenting upon the results of the Colonization movement, says that, with the backing of the Federal Government and its auxiliary societies the Society was yet not able to overcome "distance, malaria, savage neighbors, and a tropical climate."⁸³ If the positions taken in this study have been successfully maintained, that statement is inadequate. Not only were all those difficulties, except distance, satisfactorily overcome, but, from the point of view of Africa alone, there were brought about two important results: (1) the establishment upon the west African coast of a model republic for Africans, and (2) the salvation of many thousands of natives from the holds of miserable slave ships. If viewed alone in the light of its influence upon Africa, was not this something? Indeed, was it not worth the effort required to bring the Society into being and to preserve it for so many years?

⁸² Edward Everett, Address at Anniversary of American Colonization Society, MS., January 18, 1853.

⁸³ Hart, p. 163.

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THE OBLIGATION OF CONTRACTS
CLAUSE OF THE UNITED STATES
CONSTITUTION

BY

WARREN B. HUNTING, PH.D.

Late Second Lieutenant, 168th Infantry, A. E. F.

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PREFACE

The general purpose of this study is the examination of the questions which have been decided by the Supreme Court of the United States in cases arising under that clause of Article I, section 10, of the United States Constitution which provides that "no States shall . . . pass any law impairing the obligation of contracts" (and which will, for convenience, be referred to, hereafter, as the "contracts clause"), in so far as these questions relate, in any way, to special privileges granted by the States. By "special privileges" reference is had to what are commonly known as "franchises," such as the privilege of being a corporation, the privileges of engaging in certain public service businesses such as that of common carriage, the privilege of exercising the state's power of eminent domain, the privilege of using the public streets and highways for tracks, pipes, wires, etc.; and also to those privileges which may be distinguished from "franchises" by the designation of "immunities," such as the immunity or exemption from taxation by the state, or from rate regulation. This use of these terms is adopted because it calls attention to an important distinction between the two kinds of privileges. The usage is not universal, however. Blackstone designates all special privileges by the general term "franchises."

A survey of the decisions will show that the questions arising in these cases, when viewed most broadly, divide themselves into two rather different fields of inquiry. The first field is concerned with the questions which are peculiar to the "contracts clause," *per se*—such as, What is a "contract"?—and which are fundamental to a true understanding of the clause. The second field is concerned with the construction of particular grants of privileges. Here the leading principle is the so-called doctrine of the strict con-

struction (in favor of the state) of state grants. It might be described as the general law of franchises and immunities, for it is a body of law whose characteristic rules are due, not to the "contracts clause" itself, but to the fact that the States have made certain peculiar grants or contracts which, because they have been made by States, are regarded and construed in a peculiar way. These rules might easily have arisen had there been no "contracts clause" in the Constitution. They would have arisen wherever franchises are regarded as legal interests to be protected by the courts from infringement by the Government, whether under the "due process of law clause" or some other similar constitutional provision or the ordinary law of the land.

In the first of the two fields of inquiry which we have noted it has been the especial endeavor to arrive at a true understanding of the principal conceptions underlying the "contracts clause" or, at least, of such of them as are necessarily involved in a consideration of the contracts of the States. This part of the study will include an examination of the much criticised Dartmouth College case and the hardly less criticised case of *Fletcher v. Peck*, with the purpose of determining the justice of these criticisms.

In the second field the special endeavor has been to discover the proper conception of the doctrine of strict construction, and to trace the application of that doctrine to the details of the various particular franchises which have been the subject of litigation with the purpose of stating, so far as possible, what the cases have actually decided, of testing the correctness of the application of the doctrine of strict construction to particular cases, and of tracing the fluctuations, if any there be, in the general attitude of the court towards this doctrine. This can be done the better inasmuch as the Supreme Court, in these cases, has generally confined itself to a reference to its own precedents, which thus have gradually worked themselves out into a more or less unified body of law.

A more detailed explanation of the field covered and its relation to the whole subject of the "contracts clause" will be found in the Introduction, which follows. It is not thought that the work done in the second field of inquiry, because it is confined to an examination of the decisions of the United States Supreme Court alone, will be lacking in practical utility, for it is only these decisions that can give an authoritative statement of the law of franchises and immunities as it will be applied by the federal courts when their aid is invoked for the protection of these grants, and they are asked to apply the prohibitions of the "contracts clause." In the second place, although the State courts are not bound to follow the decisions of the Supreme Court in so far as they may choose to give a greater protection to franchises, either by applying the "contracts clause" or some prohibition of the State constitution, than the Supreme Court has seen fit to do, nevertheless the State courts do regard the decisions of the Supreme Court in this class of cases with very great respect, and will generally follow them. Therefore the Supreme Court decisions are about the best source from which to discover what has been termed the general law of franchises and immunities; and because the "contracts clause," under the Constitution and the provisions of the United States statutes as to the judiciary, always gives the Supreme Court jurisdiction of these cases where the owner of the franchise is dissatisfied with the decision of the State court, a great many of them have, naturally, come before the court, thus securing a comprehensive and more or less unified character to its body of decisions on this subject.

The writer wishes to express his sense of indebtedness to Professor W. W. Willoughby, director of the Department of Political Science at the Johns Hopkins University, because it was through him that he was led to undertake this study, and more especially because it is his instruction and friendly counsel, very largely, that have enabled the writer to

obtain a conception of the methods and requirements of legal reasoning.

W. B. H.

Dr. Hunting was killed in France on July 15, 1918, while serving in the American army. He had intended to add to the study here published chapters dealing respectively with "Consideration," "Franchises under the Contracts Clause," "Charters," "Special Franchises," "Rate Privileges," "Tax Exemptions," "Effect of Sales, Mortgage Foreclosures, Reorganizations, Consolidation and Merger upon Franchises," and "The Effect of the Reserved Right to Alter, Amend or Repeal upon Charter Franchises and Privileges." Considerable progress had been made by Dr. Hunting upon these chapters, but the manuscript was not in a condition that justified its publication.

THE OBLIGATION OF CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION

CHAPTER I

INTRODUCTION

The most fundamental of the questions arising out of the "contracts clause" are obviously these: (1) What is a "contract"? (2) What is the "obligation" of a "contract"? (3) What is a "law"? (4) What constitutes an "impairment"? A general view of the cases that have arisen under this clause suggests that the contracts which are sought to be protected under it may profitably be classified into contracts between private individuals, that is, private contracts, and contracts between a State and private individuals, or between two States, that is, State contracts. This classification is justified by the fact that the two kinds of contracts, generally speaking, do not both raise for solution the same fundamental inquiries, the nature of which we have already stated. And in the cases where they do raise the same fundamental inquiry, the principle for determining it is often different in the case of state contracts from what it is in the case of private contracts.

The purpose of this study is to cover those contracts of the States which confer special privileges, and which may be designated as "franchises" and "immunities," that is to say, the franchise is to be a corporation, and franchises to engage in public services such as railroad, street railway and telegraph franchises, ferry and bridge franchises, water and gas franchises, franchises to use the streets of a city for gas and water pipes and street railways, and finally, because they are of somewhat the same nature as these fran-

chises, rate privileges and tax exemptions. This study, therefore, omits from the field of state contracts those cases which have dealt with contracts contained in state securities—that they should be receivable in payment of taxes and the like,—land grants by the States, and cases of contracts between the States, or between a State and the United States.

The first question to be considered is the power of the States to obligate themselves by contract. This involves first a consideration of the meaning of the terms "obligation" and "contract," viewed as technical legal concepts, and then a consideration of their meaning when viewed in the light of the circumstances surrounding the adoption of the "contracts clause." It involves also the more specific questions, whether a grant is a contract and whether a charter of incorporation is a contract. It will then be considered whether or not a consideration is required for the validity of the contracts of the States, and if so, what constitutes a consideration.

As the obligation of a contract, generally speaking, has been held to be that which a party is obligated to do, according to the law of the State wherein the contract was made and as prescribed by that law at the time the contract was so made, it is obvious that in these cases the federal courts, when they seek to determine what the obligation of a particular contract is, are called upon to determine a question of state law. Moreover, as regards contracts made by the state which can, of course, only be made by law, as the state can only act through law,¹ the legislature must be authorized by the state constitution to make the contract, and must enter into a contract by means of a legislative act, and any inferior body must likewise obtain authority from the legislature, before it can enter into contracts on behalf of the state. In these cases, therefore, the federal courts not only have to determine a question of state law, but a question of state constitutional or statutory law. Some consideration,

¹ W. W. Willoughby, *The Nature of the State*, pp. 195, 221.

therefore, is necessary of the relations between the state and federal courts in cases of this kind, and the respect paid by the federal courts to the decisions of the state courts.

The obligation of a contract is, of course, chiefly determined by the language of the particular contract in question, and the courts must necessarily interpret this language for themselves, so that, in many cases, perhaps in the greater part of those here reviewed, the court is engaged simply in construing the language of particular contracts. It is doing what any state court might have to do, under the ordinary law or under provisions in the state constitution, and which the Supreme Court itself might have had to do under the "due process clause" of the federal Constitution, as well as under the "contracts clause." As one of the parties to these contracts is a State, however, a new aspect is put upon the question; the contract is no longer construed by the ordinary rules; it is interpreted in the light of a special canon of construction that has been adopted by the courts, namely, that all such contracts are to be construed strictly against the grantee and in favor of the State. The general nature of this doctrine of strict construction must therefore be considered, and this will be followed by chapters upon charters, special franchises, rate privileges and tax exemptions, all of which will be chiefly taken up with tracing the application of this doctrine to the facts of particular cases.

The effect of mortgage foreclosures, consolidations, mergers, sales and reorganizations of corporations is included in the study, first, because no opinion can be given upon the question whether a corporation has or has not the privileges which belonged to its predecessor corporation unless one is familiar with the peculiar rules of law applicable to these transactions; secondly, because these rules very largely result from an application of the doctrine of strict construction.

The subject of the effect of the reserved right to alter, amend or repeal charters, franchises and immunities is also

treated, inasmuch as this is now one of the most important phases of the law dealing with these special privileges. It may probably be said, also, that the cases on this subject involve, theoretically at any rate, an application of the prohibition of the "contracts clause."

It was intended to add chapters dealing with the police power as affecting franchise and immunities, with the question what is an "impairment," and the question what is a "law," but these, owing to lack of time to complete them, have been omitted.

CHAPTER II

THE MEANING OF "OBLIGATION OF CONTRACTS" CONSIDERED

It was stated in the preceding chapter that the questions arising out of the "contracts clause" might be analyzed, in a general and abstract way, into: what is a "contract"? what is its "obligation"? what is a "law"? and what constitutes an "impairment"? Within the first two of these inquiries have fallen the most important particular questions which have arisen over the "contracts clause"—the questions which have aroused the most discussion and have given rise to the most celebrated cases. These are: whether a grant or executed contract is a "contract" and gives rise to an "obligation"; whether a state can "contract" and be under an "obligation" thereby; whether a charter of incorporation can be said to be a "contract"; whether the "obligation of contracts" is derived from natural or from positive law—a pertinent question in determining whether the "obligation" of a "contract" can be prospectively impaired, or only retrospectively; finally, whether the remedy for the enforcement of a "contract," which is in force at the time of its making, is a part of the "obligation."

The last of these questions falls rather within the domain of private contracts, or contracts between individuals, than within the domain of state contracts, and so does not especially concern us, but the first four are all involved in a consideration of the contracts of states, and therefore demand our attention. Of course, these questions have long since been answered in leading cases that settle the law upon the points involved. A review of the first eight cases decided by the court, wherein the "contracts clause" was applied, will give the answers to the questions which we have put.

They are taken in their chronological order so as to show the way in which the law actually developed.

In 1810 in *Fletcher v. Peck*,¹ it was held that a grant of land was a contract, and that a State was as much obligated by its grant of land as an individual by his. A statute repealing the grant was, therefore, held to impair the obligation of a contract.

In 1812 in *New Jersey v. Wilson*,² it was held that an agreement providing for exemption from taxation, made with the Indians by the State of New Jersey in connection with a tract of land granted them in consideration of a surrender by them of their claims to other tracts of land, was a contract protected by the "contracts clause."

In 1819 in the case of *Sturges v. Crowninshield*,³ it was held that a state bankruptcy law impaired the obligation of contracts which had been made prior to its enactment. It was not necessary to determine whether the obligation of the contract was created by positive or by natural law.

In the very next case, however, *McMillan v. McNeill*,⁴ Marshall, speaking for the court, did hold an insolvent law to constitute an impairment of the obligation of a contract made subsequent to its enactment, stating that the case could not be distinguished from that of *Sturges v. Crowninshield*. This holding of Marshall's was later explained away, upon the ground that the insolvent law there involved was that of Louisiana, while the contract was made in South Carolina, and hence was not subject to the law of Louisiana in so far as its essential validity and its obligation were concerned.

In the same year, 1819, the case of *Trustees of Dartmouth College v. Woodward*⁵ was decided. This case held that the charter incorporating Dartmouth College, granted by the Crown in the year 1769, constituted a contract with

¹ 6 Cranch, 87.

² 7 Cranch, 164.

³ 4 Wheat. 122.

⁴ 4 Wheat. 209—1819.

⁵ 4 Wheat. 518.

the English state the obligation of which passed to the State of New Hampshire upon her severance from England, and came under the protection of the United States Constitution when she became a member of the Union. The case has always been regarded as establishing the doctrine that all charters of private corporations are contracts.

In *Owings v. Speed*⁶ it was held that the "contracts clause" did not operate to invalidate a law passed prior to the going into effect of the Constitution.

In *Farmers' and Mechanics' Bank v. Smith*⁷ the principle of *Sturges v. Crowninshield* was reaffirmed.

In 1823 in *Green v. Biddle*⁸ it was held that a contract between two of the States of the Union was within the protection of the "contracts clause" equally with a contract between two individuals, or a State and an individual.

In 1827 in *Ogden v. Saunders*⁹ it was held that a state insolvency law could not be considered as operating as an impairment of the obligation of contracts entered into subsequently to its enactment. The majority judges delivered separate opinions, the reasoning of which—each judge looking at the question from a slightly different point of view—is difficult to harmonize. It is probably true, however, that they all essentially agreed on the proposition that the obligation of a contract made within a sovereign state, must be precisely that allowed by the law of the state and none other. This case contains the best discussion to be found in the reports as to what is the meaning of the words "obligation" and "contracts" as found in the Constitution.

In the light of these adjudications it might seem that further discussion of these questions would be useless. However, the first and fifth of these decisions, particularly, have been very much criticised. It has been said that Chief Justice Marshall was wrong both in the decision that a grant was a contract and in holding that a charter of

⁶ 5 Wheat. 420—1820.

⁷ 6 Wheat. 131—1821.

⁸ 8 Wheat. 1.

⁹ 12 Wheat. 213.

incorporation was a contract; that the first decision was made in a friendly suit, manufactured for the purpose of obtaining a ruling; and that, in the second, the court was led astray by the persuasive eloquence of Daniel Webster, combined with the weakness of the opposing counsel, and the employment by Webster and his associates of influence other than that of argument in open court. It has also been said that the "contracts clause" was never intended to apply to the contracts of the States.¹⁰

Because it is believed that it is a matter of some interest to determine whether these foundation principles of our constitutional jurisprudence are fundamentally wrong or not, and that it is possibly a matter of present importance, in so far as the tendency to a gradual warping away from these principles is increased, if the belief is general that they were wrongly decided, we shall undertake an examination of the *ratio decidendi* of these decisions in order to determine the justice of the criticisms which have been made upon them. It is believed, also, that such an examination will bring out the fundamental conceptions involved in this clause more clearly than it is possible to do in any other way.

For the purposes of the following discussion we shall

¹⁰ The most elaborate criticism of the Dartmouth College Case is to be found in John M. Shirley's "The Dartmouth College Causes," a book devoted exclusively to that purpose. The number of critics is swelled, however, by such writers as the late Chief Justice Doe of New Hampshire, writing in 6 Harvard Law Rev. 161, 213; Clement H. Hill in 8 Am. Law Rev. 198 (perhaps the strongest criticism that has been made); and numerous others, among which may be mentioned the anonymous writer in 28 Am. Law Rev. 440; J. F. Orton in the Independent, Aug. 19 and 26, 1909; J. P. Cotton, Jr., in his edition of Marshall's decisions. On p. 347 Cotton says: "One rises from the opinion dissatisfied—there is bias in the statement of facts, bias in the statement of premises, and the assumption that the charter was a contract is too hasty and too barely supported." Adverse judgments are expressed by Prof. Jeremiah Smith in John Marshall, ed. by Dillon, vol. i, pp. 154-155, 370; by Morawetz in his work on Corporations, 2d ed., sec. 1045, p. 1005. Henry Cabot Lodge, in his life of Daniel Webster, expresses the opinion that the decision was due to Webster's skillful presentation of the political aspects of the case so as to arouse within Marshall a belief that the principles of Federalism were menaced. See, to the same effect, 28 Am. Law Rev. 356.

need to premise only two or three of the ordinary rules of statutory and constitutional construction which, we assume, any person who endeavors to ascertain the true meaning of the "contracts clause" would have to follow, namely: that the words and phrases of the clause should be given their ordinary meaning; that since it is quite apparent that the clause is dealing with a technical, legal subject matter, its terms should be interpreted in the light of their technical or legal meaning, which would be, presumptively, the meaning given to them by the common law; finally, that the court must look to the general opinion current at the time of the adoption of the Constitution, and at all facts and circumstances shedding light on that opinion, in order to determine whether the technical meaning of the language used should be either restricted or enlarged.

With this preface, we shall begin with the first question that was presented to the court, that is, whether a grant was a "contract" with an "obligation" within the meaning of the "contracts clause."

Is a Grant a Contract?

In answering this question we must consider, to some extent, what was meant by "contracts" and what was considered to be their "obligation." And perhaps the best way to approach the subject is by considering the views of modern jurists as to the conceptions included in these terms.

First, as to obligation: this term originated in the Roman law, and was a fundamental conception of that law, as it has been and still is of the civil law. The excellent explanation given by Salmond is quoted in the notes, where it may be referred to,¹¹ but for our present purpose his short

¹¹ Salmond, *Jurisprudence*, sec. 165, p. 428: "Obligation, in its popular sense is merely a synonym for duty. Its legal sense, derived from Roman law, differs from this in several respects. In the first place, obligations are merely one class of duties, namely those which are the correlatives of rights in *personam*. An obligation is the *vinculum juris*, or bond of legal necessity which binds together two or more determinate individuals. It includes, for example, the duty to pay a debt, to perform a contract, or to pay damages for a tort

definition is sufficient. He says: "An obligation, therefore, may be defined as a proprietary right *in personam* or a duty which corresponds to such a right." Disregarding the qualification of "proprietary" which is immaterial to our present purpose, it will be noted that an obligation is a legal relationship between two persons, involving a right on one side and a duty on the other (though the duty is often the only part of the relation referred to as the "obligation"), and that this duty is one *in personam*, that is, it is a particular duty owed to the other party to the relationship, such as a promise to pay money, and is contradistinguished from a common duty which all alike owe, such as the duty of refraining from interfering with a person's rights over the property which he owns. The obligation, being a legal relationship, is necessarily a creature of law. Of course certain acts are the occasions of the arising of obligations, but such acts cannot truly be said to create them.¹³ This conception is that which modern jurists, equally with the jurists of Rome, attribute to the term obligation.

As to contract: Savigny defined a contract as "the concurrence of several persons in a declaration of intention whereby their legal relations are determined."¹³ According to this definition, it will be noticed, a conveyance would constitute a contract since, in a conveyance, the legal relations of the two parties are determined by a concurrence of the wills of the parties; and it is for this reason that Markby criticises Savigny's definition,¹⁴ claiming that he thereby loses sight of the fundamental distinction between a conveyance and a contract, which Austin so laboriously insisted

but not the duty to refrain from interference with the person, property or reputation of others. Secondly, the term obligation is in law the name not merely of the duty but also of the correlative right. . . . Thirdly, and lastly, all obligations pertain to the sphere of proprietary rights. . . . An obligation therefore may be defined as a proprietary right *in personam* or a duty which corresponds to such a right."

¹³ Markby, *Elements of Law*, sec. 603, p. 298.

¹³ Savigny, *Treatise on Roman Law*, 2d French ed., Paris, 1856, vol. iii, p. 314; see also Markby, sec. 608.

¹⁴ Markby, secs. 609-610.

upon. He thinks it unimpeachable as a definition of "agreement," but would limit the term contract to those agreements which involve a promise to do or forbear from some future act. In other words, he would limit the idea of contract to agreements by which obligations are occasioned between the parties. The dispute is, to a certain extent, one of nomenclature, for Savigny made a division of contracts into two classes, obligatory and not obligatory. What Markby calls a contract, he calls an "obligatory contract," that is, a contract which occasions an obligation between the parties.¹⁵ Savigny's conception of an obligatory contract is that which most of the English jurists term a contract. Thus Anson says: "Contract is that form of agreement which directly contemplates and creates an obligation."¹⁶ According to Salmond, "A contract is an agreement which creates an obligation or right *in personam* between the parties."¹⁷ When Pollock says, "a contract is an agreement and promise enforceable by law,"¹⁸ the idea that the agreement contemplates and effects an obligation is conveyed by the added words "and promise." Salmond criticises this definition on the ground that certain agreements occasion legal relations which may be termed contracts, although they are not enforceable, for example, voidable and illegal contracts—but into this question it is not necessary to enter. Holland accepts Savigny's wide use of the word contract, distinguishing, however, between the wider and narrower senses of the term.¹⁹

It is, therefore, clear that, although these jurists differ upon the question whether or not a conveyance should prop-

¹⁵ Savigny. See, for example, p. 317, where he says: "If one misconceives the contractual nature of these numerous and important acts, it is because he fails to distinguish from them the obligatory contract which ordinarily precedes and accompanies them. Thus, for example, in the sale of a house, attention is called, and rightly, to the obligatory contract of sale, but it is forgotten that the subsequent 'tradition' is a contract at the same time entirely apart from this sale, although necessitated by it."

¹⁶ Anson, *Contracts*, 11th ed., p. 2.

¹⁷ Salmond, *sec. 123*, p. 313.

¹⁸ Pollock, *Contracts*, p. 2.

¹⁹ Holland, *Jurisprudence*, 10th ed., pp. 209, 249.

erly be termed a contract, they all agree that a conveyance, whether contract or not, does not give rise to any obligation. The English jurists, indeed, have laid great stress upon the point. Austin insisted upon the distinction with his characteristic vigor, and Markby, Holland and Salmond have all followed him. So also have Anson and Pollock in their authoritative treatises on the law of contracts. Anson says, speaking of agreements, and meaning thereby a concurrence of the will of two or more persons whereby their legal relations are determined: "But agreement as thus defined seems to be a wider term than contract. It includes legal transactions of two kinds besides those which we ordinarily term contracts. These are: (1) Agreements the effect of which is concluded so soon as the parties thereto have expressed their common consent in such manner as the law requires. Such are conveyances and gifts wherein the agreement of the parties at once effects a transfer of rights *in rem*, and leaves no obligation subsisting between them."²⁰ Sir Frederick Pollock expresses the same idea when he says: "A consideration, properly speaking, can be given only for a promise. Where performance on both sides is simultaneous, there may be agreement in the wider sense, but there is no obligation and no contract."²¹

The manner in which this result is reached will clearly appear if we glance over the fundamental doctrines which these jurists propound. The content of a legal right is "a capacity residing in one man of controlling . . . the actions of others." This capacity is given by the state to the possessor of the right. The state is the creator and recognizer of rights. And this is the principle upon which it creates or recognizes rights or the transference of them: "The origination, transfer and extinction of rights . . . are due to Facts, i.e., either an Event or an Act."²² A Juristic Act is defined as "a manifestation of the will of a private

²⁰ Anson on Contracts, p. 3.

²¹ Pollock on Contracts, 7th Eng. ed., p. 167. See also Holland, pp. 248-249.

²² Holland, p. 151.

individual directed to the origin, termination or alteration of rights."²³ Another name for Juristic Act, and one which shows its nature very clearly, is Act in the Law. Further, "Juristic Acts are distinguished into 'one-sided,' where the will of only one party is active, as in making a will, accepting an inheritance, or taking seisin; and 'two-sided,' where there is a concurrence of two or more wills to produce the effect of the act, which is thus a 'contract' in the widest sense of that term."²⁴ In other words, the theory seems to be that rights are created and transferred, but always by the state. The state takes cognizance of certain phenomena, upon the appearance of which it declares rights to exist or to inhere in certain persons. A contract or agreement between two persons is simply one of these phenomena. When "A" enters into an agreement whereby he gives his chattels or his land to "B" and agrees that "B" shall have them, "B" acquires rights in the transferred property, not because "A" gave them to him, but because the law declares that he shall have them. The law terminates "A's" rights and originates "B's."²⁵ There is no obligation, no subsisting legal relation arising out of the transaction.²⁶

This analysis of the operation and effect of a conveyance seems strange, at first glance, because of the extent to which it minimizes the part played by the grantor in the transaction. One naturally feels that the grantee acquires his right because the grantor gives it to him. In other words, the grantor had a right to possess and control the thing; he had a right, likewise, to give it away. Yet, if one pushes the analysis a little farther along this line, he might without much difficulty arrive at the conclusion that the absolute

²³ Ibid., p. 112.

²⁴ Ibid., p. 118.

²⁵ Ibid., p. 153.

²⁶ It is difficult to understand what Holland means by the following note, which is found on page 153: "Fuchta, Inst. II, p. 325, points out that in all derivative acquisitions there is a legal relation between the *auctor* and the person acquiring; not merely a loss by one and a gain to another as in *usucapio*."

owner and possessor of a right can not really divest himself of it, but that the most he can do is to agree to allow another person to exercise possession and control over the thing, and to agree not thereafter to assert his own rights, as against such person. We would say, however, that we do not believe that the natural, or ordinary, practical view of the transaction—which we have already vouched as authority for questioning the view that the whole force of a conveyance is derived from the law alone—would reach to the other logical extreme of holding that the donor's power is so absolute that he cannot divest himself of it. The practical view would rather be, it seems to us, that the grantee derives his right from the consent of the grantor, and yet that, once the grantor has completed the formalities evidencing that consent, all his right and power has become extinguished, and he is not, therefore, under any further and subsisting obligation towards his grantee.

Turning next to *Fletcher v. Peck*, it is noticeable that both Chief Justice Marshall, delivering the opinion of the majority of the court, and Justice Johnson, dissenting, adopt the general conception, which we have heretofore given, of the term obligation. It is only when they come to apply that conception to the case of a conveyance that they are unable to agree. What we have termed the practical view, and what is, when elaborated and fitted into a system, the view of the modern jurists, was stated very clearly, in that case, by Justice Johnson in his dissenting opinion. He said:

Whether the words "acts impairing the obligation of contracts" can be construed to have the same force as must have been given to the words obligation and *effect* of contracts is the difficulty in my mind.

There can be no solid objection to adopting the definition of the word "contract" given by Blackstone. The etymology, the classical signification and the civil law idea of the word will all support it. But the difficulty arises on the word "obligation" which certainly imports an existing moral or physical necessity. Now a grant or conveyance by no means necessarily implies the continuance of an obligation beyond the moment of executing it. It is most generally but the consummation of a contract, is *functus officio* the moment it is executed, and continues afterwards to be nothing more than the evidence that a certain act was done.²⁷

²⁷ 6 Cranch 78, 144.

Marshall answered the argument in this manner :

A contract is a compact between two or more persons and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing, such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of contract is performed, and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

Since then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected.²⁸

Thus Marshall gave to the word obligation the general meaning which, we have seen, Roman, civilian, and modern jurists all attribute to it. He recognized it essentially as "a tie, whereby one person is bound to perform some act for the benefit of another."²⁹ He sought to point out what it was that the grantor in a conveyance was still bound to do, or rather to refrain from doing, after the act of conveyance had been performed. Was he correct, then, in saying that every grant implies a contract not to reassert the right which has been granted?

When we ask, Was he correct? we mean, Was he justified by authority? And the first authority to which we shall turn will be the writers upon the general jurisprudence of that time. It seems to us that it must be borne in mind, in any consideration of the early cases construing the "contracts clause," that the phrase "obligation of contracts" was foreign to the common law, but that it was a term and conception in general use in the Roman and civil law and

²⁸ 6 Cranch, 78, 136.

²⁹ This is the definition of Holland, p. 236.

in the so-called law of nature; and, finally, that the principles of this law of nature constituted the generally accepted philosophy of law of that day.⁸⁰

It is a reasonable presumption that the writers upon natural law would tend to regard a conveyance of property as a contract. In developing a theory of property, these jurists usually started with some such general proposition as that all things were originally owned in common. This gave each man a natural and inherent right in the world's wealth. The general mass of property was then usually regarded as having been divided up by an agreement or contract between every one, each renouncing his right in the property which was thereafter to be owned in severalty by each of the others. This plainly partakes of the nature of an obligatory contract. The more so because, philosophically viewed, one can not, of his own act, totally divest himself of a right which is absolutely his. And, in any event, the one and only element of the conveyance, according to natural law, was the consent of the parties. Or, if they started with the premise that no man had any right of property at all, they then derived the right of property from a general contract whereby each agreed not to interfere with the enjoyment of the others in the specific pieces so allotted to each. Here, also, is plainly an obligatory con-

⁸⁰ How generally accepted it was we shall show in more detail hereafter. We shall also show that Marshall accepted the doctrine, and that his construction of the "contracts clause" was always based upon this "natural law" conception of obligation and contract. It will hardly be disputed that, in deciding *Fletcher v. Peck*, it would have been quite proper to have adverted to the writers upon natural law to see what light they were able to shed upon the question whether or not a conveyance was a contract and involved a subsisting obligation. The arguments in *Fletcher v. Peck* are not reported. It was not the custom then, we believe, to file printed briefs. Arguments were confined to those made orally in court, of which the judges took notes. Although, therefore, it is not certain that civil or natural law precedents were referred to in that case, it is extremely probable that such was the fact, in view of the eminence of the counsel—J. Q. Adams and Joseph Story on one side and Luther Martin on the other—and in view of a reference to civil law doctrines which Justice Johnson made in his dissenting opinion.

tract. The transferring of the right, thereafter, would seem to partake of much the same nature.

In confirmation of the foregoing statements regarding the views of the writers upon natural law, we may cite Pufendorf. This writer holds that certain obligations are, by the law of nature, born with men; but that all other obligations, which he terms "adventitious" obligations, "proceed from a simple, or from a mutual act, of which the former is properly called a *free grant* or *promise*, the latter a *pact* or *covenant*." Regarding promises and pacts or covenants, he says:⁸¹

But inasmuch as all acknowledge that promises and pacts do transfer a right to others, before we proceed, it may not be improper to examine Hobbes's opinion about the transferring of right. He then, from his project of a state of nature, having inferred, that every man hath naturally a right to everything, and having farther shown, that from the exercise of the right there must needs arise a war of every man against every man, a state very unfit for the preservation of mankind, he concludes, "That whilst reason commands men to pass out of this state of war, into a condition of peace, which peace is consistent with a right of every man to every thing, it at the same time prescribes that men should lay down some part of this universal right." "A man," he says, "may lay down, or divest himself, of his right in two ways, either by simply renouncing it, or by transferring it to another. The former is done, if he declares by sufficient signs, that he is content it shall hereafter be unlawful for him to do a certain thing, which before he might have lawfully done. The latter if he declare by sufficient signs to another person, who is willing to receive such a right from him, that he consents it shall be for the future, as unlawful for himself to resist him in the doing of a certain thing, as he might before have justly resisted him." Hence he infers that the transferring of right consists purely in non-resistance; or that, he who in a state of nature transfers a right to another does not give the other party a new right which before he wanted, but only abandons his own right of resisting such a person in the exercise of his.

Pufendorf takes issue with this explanation to this extent. He maintains that in a state of nature man has powers only and not rights, "for 'tis ridiculous trifling to call that power a right, which should we attempt to exer-

⁸¹ Pufendorf, *Law of Nature and Nations*, with notes by Barbeyrac, translated by Kennett, 4th ed., 1729; Book 3, chap. v, secs. 1 and 2, p. 259.

cise, all other men have an equal right to obstruct or prevent us." He then continues:³²

Thus much then we allow, that every man has naturally a power or license of applying to his use, any thing that is destitute of sense or reason. But we deny that this power can be called a right, both because there is not inherent in those creatures any obligation to yield themselves unto man's service; and likewise because men being naturally equal, one cannot fairly exclude the rest from possessing any such advantages unless by their consent, either express or presumptive, he has obtained the peculiar and sole enjoyment of it. . . . A man then acquires an original right over things, when all others either expressly or tacitly renounce their liberty of using such a thing, which before they enjoyed in common with him. This original right being once established, by virtue of which the primitive community of things was taken off, the transferring of right is nothing else but the passing it away from one to another, who before was not master of it. Hence appears the absurdity of saying, that the transferring of right consists barely in non-resistance. Inasmuch as that negative term *cannot express the force of the obligation arising from such an act*;³³ which properly implies an inward inclination to make good the contract. Though non-resistance be indeed one consequence of the obligation, and without which it cannot be fulfilled. . . . He [Hobbes] ought indeed to have expressed himself thus: Since in a state of mere nature things belonged no more to one than to another, therefore if a particular person desired the sole use of anything, to make him master of his wish, it was necessary that all other men should renounce the use of the same thing. If they did this gratis, the act had somewhat in it like a gift; if with some burden, or under some condition, it was then a kind of contract, for which we have no name. But should one man have renounced his power over such a thing, this could have been no prejudice to others, and consequently he only would have been debarred from the use of it, who had thus freely quitted all title to it.

It would seem correct to say that both Pufendorf and Hobbes regarded a conveyance as essentially a contract with a subsisting obligation. Hobbes' "renunciation" is clearly a contract, and Pufendorf's chief objection is that Hobbes makes the "obligation" of the transaction merely a passive one. It being established that an obligation arises out of the transaction, the fact that Pufendorf calls those conveyances which are made gratis gifts, and those made with a burden or condition contracts, is of little moment. This is simply due to his peculiar use of the word "contracts." All alienation, he elsewhere states, is effected through the con-

³² Ibid., pp. 260-261.

³³ Italics ours.

currence of the will of both the grantor and the grantee,⁸⁴ which is a pact. In the ordinary acceptation of the term this would be a contract. It would clearly be a contract at common law, whose broad definition of contract, waiving the requirement of consideration, was: "An agreement of two or more persons to do or not to do a particular thing."⁸⁵ Pufendorf's distinction between pacts and contracts was certainly not the generally accepted one among writers upon the law of nature. Barbeyrac says that he derived it from some of the Roman law authorities.⁸⁶

Kent,⁸⁷ in his commentaries, writing in the year 1827, says:

There has been much discussion among the writers on the civil law, whether a gift was not properly a contract, inasmuch as it is not perfect without delivery and acceptance, which imply a convention between the parties. In the opinion of Toulhier every gift is a contract, for it is founded on agreement, while on the other hand Pufendorf had excluded it from the class of contracts out of deference to the Roman lawyers, who restrained the definition of a contract to engagements resulting from negotiation. Barbeyrac, in his notes to Pufendorf, insists that, upon principles of natural law, a gift *inter vivos*, and which ordinarily is expressed by the simple term gift, is a true contract, for the donor irrevocably divests himself of the right to a thing and transfers it gratuitously to another, who accepts it, and which acceptance, he rationally contends, to be necessary to the validity of the transfer. The English law does not

⁸⁴ Pufendorf, Book 4, chap. ix, sec. 1, p. 413: "Now as the conveyance of rights is transacted between two parties, the one from whom, and the other to whom they pass, so in those methods of acquisition which flow from the force and virtue of property the concurrence of two wills is required, the giver's and the receiver's."

⁸⁵ 2 Kent's Coms. 450; 2 Blackstone's Coms. 442.

⁸⁶ See Pufendorf, Book 5, chap. i, sec. 4, p. 473, and Barbeyrac's note 1 to Book 5, chap. iv, sec. 1, p. 80. Pufendorf says: "In my opinion the difference between pact and contract may be best taken from the object, so as to call that contract which concerns those things and actions which are the subject of traffic and so presuppose property and price; and that pact by which we covenant about other things. By this means pact, strictly speaking, will take in all negative agreements, by which we covenant not to do, or not to demand, what otherwise we might do or demand; as also those agreements that have for their object the exercise of our natural faculties, so far as they hereby tend to the promoting of mutual profit and advantage, considered merely by themselves without any regard to price, or any valuable consideration, in a word, when we agree to do some work that is not mercenary."

⁸⁷ 2 Kent's Coms. 438.

consider a gift, strictly speaking, in the light of a contract, because it is voluntary and without consideration, whereas a contract is defined to be an agreement upon sufficient consideration to do or not to do a particular thing.

Although called "civil law" writers, Pufendorf and Barbeyrac were, as we have seen, writers on the law of nature, and it was in treating of the law of nature that they discussed the nature of the transfer of rights. Pufendorf, we have further seen, seems to attribute to a conveyance all the elements of a contract except the name, and particularly that element which Chancellor Kent does not take into consideration at all, that element which was specifically required if the contract was to come within the operation of the "contracts clause," namely, the element of obligation. Toullier on the other hand, was apparently a writer on the civil law in the strict sense, and to the discussion of the civil law doctrines, which follows, he may, therefore, be added, upon the authority of Kent, as a writer who held that a conveyance was a contract. Austin in his Lectures on Jurisprudence, and particularly in several of the notes that have been appended to them, discoursed at some length upon the theories of contract and conveyance held by the writers on the civil law, and it is upon this explanation of the civil law that our discussion will be based.

The civil law's manner of dealing with this question was very unsatisfactory to Austin's logical mind, and he criticised it with much vigor. The civil law doctrine may be summarized in the language of Amos.³⁸ After describing the ceremonies of *tradition* and *mancipation*, he continues:

Most of the acts above exemplified, and the kinds of intentional transfer they represent, follow upon previous mutual promises and arrangements between the old and the new owner. This has led to an erroneous notion which has deeply coloured the history of Roman law in the Middle Ages, and which reappears in most European Codes, to the effect that all rights of ownership whatever are of necessity preceded by a contract, or at least an obligation arising out of a contract or a *delict*, and that a contract has for its main, if not its only, purpose the bringing about the acquisition of rights of ownership. The falsity and mischievousness of this notion has been exhibited in great detail, and with much assiduity by Mr. Austin.

³⁸ Amos, Jurisprudence, pp. 164-166.

Turning now to Austin himself, we find this comment upon a passage from the famous jurist Heineccius:

If you examine this passage closely, and take its parts in conjunction, you will find it involving the following assumptions: 1. That every acquisition of *dominium* consists of two degrees: One of them being the proximate; the other the remote cause of the right. One of them, *modus acquirendi* (strictly so called); the other *titulus*, or *titulus ad acquirendum*. 2. That the *titulus*, or remote cause of the right, always consists of an incident importing *jus in personam*, e.g. a contract.

And as to the doctrine of the Roman lawyers, he said that it seemed to be this:

This *tradition* is not sufficient to pass an irrevocable right, unless the preceding contract bind the alienor, and therefore impart to the alienee *jus ad rem*. In other words, the *tradition* is not sufficient to pass the right irrevocably, unless the preceding contract amount to *justus titulus: titulus ad transferendum dominium habilis*. Accordingly every acquisition by delivery, made in pursuance of a contract, is divisible into two degrees: a mode of acquisition and a title to acquire.³⁹

If, then, an obligatory contract was a necessary part of every conveyance, it would seem to follow that the transfer of the rights was to a certain extent due to this personal obligation, so that every conveyance would involve a continuing obligation of a kind. And the French code, therefore, said of a sale, where no tradition was necessary, but where title passed immediately, that the *dominium* was transferred by *virtue of the obligation of the contract*.⁴⁰

As to the English law, it is, of course, extremely difficult to say what was the general view of the common law upon a question such as this. Professor Ames and Professor

³⁹ Austin, *Jurisprudence*, pp. 995, 996, 999. Heineccius' work was published in 1789.

⁴⁰ Austin's comment on the language of the code is interesting. He says: "to style the sale a contract, is a gross solecism. It is however a solecism which may be imputed to the Roman lawyers; and with which it were not candid to reproach the authors of the Code. But when they talk of obligations as imparting dominium or property, they talk with absurdity which has no example, and which no example could extenuate. If they had understood the system which they so servilely adored and copied, they would have known that obligation excluded the idea of dominium: that it imparts to the obligee *jus in personam*, and *jus in personam* merely. This is its essential difference: This is the very property which gives it its being and its name." *Jurisprudence*, p. 1005.

Maitland have shown that the early law could not conceive of the transfer of rights as such. Their only conception was of the transfer of tangible things. A conveyance, therefore, according to Professor Ames, consisted of a transfer of the seizin or possession of the thing granted and an abandonment or extinguishment of the grantor's right in the thing. Thus Professor Ames says:

A derivative title is commonly acquired from an owner by purchase or descent. The title in such cases is said to pass by transfer. For all practical purposes this is a just expression. But if the transaction be closely scrutinized, the physical *res* is the only thing transferred. The seller's right of possession, being a relation between himself and the *res*, is purely personal to him, and cannot, in the nature of things, be transferred to another. The purchaser may and does acquire a similar and coextensive right of possession, but not the *same* right that the seller had. What really takes place is this: the seller transfers the *res* and abandons or extinguishes his right of possession. The buyer's possession is thus unqualified by the existence of any right of possession in another, and he, like the occupant, and for the same reason, becomes absolute owner.⁴¹

And again he says:

Even a relation between a person and a physical thing in his possession, as already stated, cannot be transferred. The thing itself may be transferred, and, by consent of the parties to such transfer, the relation between the transferror and the thing may be destroyed and replaced by a new but similar relation between the transferee and the *res*.⁴²

This view of the transaction is further supported by referring to the old form of conveyance of the right of a disseized owner to his disseizor. The disseized owner's right constituted what was left of ownership after it had been bereft of seizin, and it gives some idea of the nature of an ordinary conveyance when it is pointed out that this conveyance, or release, as it was called at common law, was in its early form a "quit-claim" deed.⁴³ And the phrase "quit-claim" long retained its place in the conveyancing practice.

⁴¹ Select Essays in Anglo-American Legal History, vol. iii, p. 564.

⁴² Ibid., pp. 482-483; and see the statements of Maitland in his essay on the Mystery of Seisin, pp. 601-602.

⁴³ Speaking of the forms of early releases, Holdsworth says: "Sometimes the party swore to abide by the transaction." History of English Law, vol. iii, p. 197.

It is interesting to place along side of these theories of early law the statement of Blackstone as to the nature of gifts of chattels personal, as showing the persistence of ideas in the field of law. He says: "Grants or gifts of chattels personal are the act of transferring the right and the possession of them; whereby one man renounces, and another immediately acquires, all title and interest therein."⁴⁴

Now the theory stated by Professor Ames as the one on which the early law acted, that a gift was a transfer of possession together with a renunciation of right, when viewed philosophically would tend to lead to the conclusion that a conveyance involved a contract with a subsisting obligation. But it does not necessarily follow that the early law took this further step and more philosophical view. It would be mere theorizing to try to proceed any further than Professor Ames has himself gone. It may be noted that the quit claim deed generally contained words of grant as well, and that soon the phrases in common use were that the grantor would quit-claim "his right" or even "the land" to the grantee.⁴⁵ And according to Blackstone, repeating Littleton and Coke, a release from a disseized owner operated by way of passing the right (*mitter le droit*).⁴⁶ It is not certain, therefore, that the common law did regard a conveyance in the light of a contract with a subsisting obligation. Nor do we think that the rule that a person is always estopped by his own grant affords much evidence that there was an obligation and a contract involved in a conveyance, for this doctrine was only used when a person had made a deed of property which he could not then convey, but which he had afterwards become the owner of. The deed therefor could have had no operation as a conveyance, but was given effect as an estoppel.⁴⁷

We do not find, however, writers of weight classifying

⁴⁴ 2 Blackstone's Coms., p. 421.

⁴⁵ 2 Pollock & Maitland, History of English Law, p. 91.

⁴⁶ 2 Blackstone's Coms., p. 325.

⁴⁷ 2 Blackstone's Coms., ed. Wendell, p. 290, note.

conveyances under contracts. Thus there is the statement of Blackstone, that contracts are executory or executed and that a contract executed differs nothing from a grant;⁴⁸ and a statement by his successor in the Vinerian Professorship to the effect that: "Particular goods and chattels may change their owner by gift or grant and by contract. These I mention together because, as Sir William Blackstone observes, even a gratuitous gift is not perfected but by delivery, and consequently, as I understand it, by the acceptance of the person to whom the goods are given, which has the semblance of a contract."⁴⁹ And we would point out that, call a conveyance a contract, and you raise the suggestion that there must be an obligation; you emphasize the fact that the grantee has his rights merely by the consent of the grantor; you obscure the part which the state takes in the matter; you suggest the idea that if one man obtains his right solely from another, he necessarily holds it subject to the will of the latter, who can go no farther than to bind himself never to exercise the power of revocation.

Finally there was the plain statement of Powell on Contracts, a work published in 1790, and written by a person evidently familiar with the civil law, that a conveyance involved a contract with an obligation. It was this work that Justice Washington relied upon, in his opinion in the Dartmouth College case.⁵⁰

⁴⁸ 2 Blackstone's Coms., p. 440 ff.

⁴⁹ 2 Wooddeson, Lectures, n. 410.

⁵⁰ After giving a definition of contract as found in Blackstone, and one from the civil law, Powell says, pp. 4-5: "Perhaps the following description will be deemed more simple than either. 'A contract is a transaction in which each party comes under an obligation to the other, and each, reciprocally, acquires a right to what is promised by the other.' It is evident that, under these definitions of a contract, every feoffment, gift, grant, lease, loan, pledge, bargain, covenant, agreement, promise, etc., may be included; for in all these transactions, there is a mutual consent of the minds of the parties concerned in them, upon agreement between them, respecting some property or right that is the object of stipulation. The ingredients requisite to form a contract are: First, Parties; Secondly, Consent; Thirdly, an Obligation to be constituted or dissolved. That these things must coincide is evident from the very nature and essence of a contract; for the regular effect of all contracts being

The English writers leaned strongly in the same direction. And, in spite of the opinion of Austin that it is an absurdity to say that the Roman law regarded an obligation as imparting *dominium*, it seems to us that when it was said that *tradition* alone was not sufficient to pass an irrevocable right if there was not a preceding contract binding the alienor, the obligation of such precedent contract is an essential part of the conveyance, and may be said to be subsistent in every conveyance, even though it is not, of itself, sufficient to effect the transfer of rights *in rem*.⁵¹

And, finally, we would point out that a distinction might be drawn between a conveyance by an individual and a conveyance or grant by the state, and that the latter might be regarded as more in the nature of a contract than the former, inasmuch as the state has the power to disregard its own grants.

As to the English law on this point, it is difficult to say what was the theory about Crown grants. It is true that Buller, J. said, in *The King v. Passmore*,⁵² that "the grant of incorporation is a compact between the crown and a number of persons, the latter of whom undertake, in consideration of the privilege bestowed, to exert themselves for the good government of the place. If they fail to perform it, there is an end of the compact." The question in the case

on one side to acquire, and on the other to part with, or alien some property, or to abridge and restrain natural liberty by binding the parties, or one of them to do, or restraining them or one of them, from doing something which before he might have done or omitted doing at his pleasure, it is necessary that the party to be bound, shall have given his free assent to what is imposed upon him."

⁵¹ As to the true theory of the matter, we are not able to refute the arguments of the modern jurists we have referred to. Their contentions seem unanswerable. And if their view is the correct one, it would seem much better not to speak of conveyances as contracts in any sense. The term contract distinctly suggests the idea of obligation. Possibly the writers who use it do see some sort of obligation in a conveyance. We have already noted the reference by Holland to Putsch's opinion "that in all derivative acquisitions there is a legal relation between the *auktor* and the person acquiring; not merely a loss by one and a gain to another, as in *usucapio*." Holland, p. 153. What else can such a relationship be but a right *in personam* with its corresponding duty?

⁵² 3 T. R. 246.

was, however, over the duties of the incorporators who clearly had entered into an obligatory contract. Speaking of franchises, Blackstone said: "But the same identical franchise that has been granted to one cannot be bestowed on another, for that would prejudice the former grant." Nevertheless, the authorities which he cites do not offer any special suggestion of the contract as opposed to the conveyance theory.⁵³ And also, as to the doctrine that the king cannot repeal a charter once granted, the leading case of *The King v. Amery* does not disclose any particular theory of contract.⁵⁴

Whether it was because, being a believer in the general doctrines of natural rights and natural law, he considered that all conveyances were in the nature of contracts, or whether it was a distinction based upon the nature of state grants, we find that James Wilson, the reputed author of the "contracts clause,"⁵⁵ in an argument made in 1785, contended that whenever the state passes a law granting land,

⁵³ The two authorities are as follows: *Keilway*, 196 (1688): "To which the court responded and said, that if the King, by his letters patent dated May 1st grant me an office, or other things; and then by other patents dated May 2nd he grants the same thing to a stranger, these second patents are merely void, and moreover, I will have a *scire facias* against the second patentee and will avoid these last patent by judgment of the court." 2 *Rolle*, Abr. 191 (1668): "If the King grant two several letters patent of the same thing, the first patentee can have a *scire facias* against the later patentee to repeal the later patent."

⁵⁴ 3 T. R. 515; at 568, the court say: "The third and last question will then be, what is the effect of the subsequent charter of restoration by King James the Second? And as to that we are of opinion that it was a void charter, and of no effect. For though it be competent to the Crown to pardon a forfeiture and to grant restitution, that can only be done where things remain *in statu quo*, but not so as to affect legal rights properly vested in third persons, which is the case here; for Charles the Second whilst the forfeiture existed had incorporated a new body of men in the town, and invested them with new rights; which being done, it would not have been in the power of Charles the Second, and of course it was not within the power of his successors, to defeat an interest once legally vested in such new corporation; and there cannot exist in the same place two independent corporations with general powers of government, and therefore we think that such charter of restoration was absolutely void and of no effect."

⁵⁵ See the argument of Hunter in *Sturges v. Crowninshield*, 4 Wheat. 122.

or granting charters of incorporation or other privileges of that nature, such laws are to be considered as compacts. This argument was made in opposition to certain legislation then pending in the Legislature of Pennsylvania, the purpose of which was to repeal the charter of the Bank of North America, which had been granted by a preceding legislature. Among his reasons for opposing the legislation was the following:

Because such a proceeding would wound that confidence in the engagements of government, which it is so much the interest and duty of every state to encourage and reward. The act in question formed a charter of compact between the legislature of this state, and the president, directors and company of the Bank of North America. The latter asked for nothing but what was proper and reasonable: the former granted nothing but what was proper and reasonable; the terms of the compact were, therefore, fair and honest; while these terms are observed on one side, the compact cannot, consistently with the rules of good faith, be departed from on the other.⁵⁶

Again, after stating that in most cases it is true that a state must have the power to amend and repeal its own laws, he continues:

Very different is the case with regard to a law by which the state grants privileges to a congregation or other society. Here two parties are instituted, and two distinct interests subsist. Rules of justice, of faith, and of honor, must, therefore, be established between them: for if interest alone is to be viewed, the congregation or society must always lie at the mercy of the community.

Still more different is the case with regard to a law by which an estate is vested or confirmed in an individual; if, in this case, the legislature may, at discretion, and without any reason assigned, divest and destroy his estate, then a person, seized of an estate in fee simple, under legislative sanction, is, in truth, nothing more than a solemn tenant at will.

For these reasons, whenever the objects and makers of an instrument, passed under the form of a law, are not the same, it is to be considered as a compact and interpreted according to the rules and maxims by which compacts are governed.⁵⁷

⁵⁶ 1 Wilson's Works, ed. Andrews, p. 565.

⁵⁷ Wilson held a doctrine of obligation which may be epitomized in the following sentences taken from the law lectures which he published in 1792. After stating Pufendorf's doctrine "that obligations are laid on human beings by a superior," he continues: "To different minds the same things, sometimes, appear in a very different manner. If I was to make a maxim upon this subject, it would be precisely the reverse of the maxim of Baron Pufendorf. Instead

If it erred at all, we think the summary heretofore made of the authority which Marshall had for his ruling that a grant was essentially a contract, erred because it stated the case too weakly.

In discussing the question whether a conveyance is a contract, it was not clearly determined whether the "obligation" of a contract, as that term is used in the Constitution, referred to the obligation created by positive law, or to some other obligation—say that created by natural law. Nor was it necessary to do so in order to pass judgment upon the point. For if the obligation was that created by positive law, the Roman, civil and common law authorities which we have cited were clearly in point, and the doctrines of natural law would still have had a bearing on the question, not as being absolute authorities, but as having some persuasive force. If, on the other hand, the term "obligation," as we suggested, was intended to have reference to what may be called the "natural law" obligation of con-

of saying that a man cannot obligate himself; I would say, that no other person on earth can oblige him, but that he certainly can oblige himself. Consent is the sole principle, on which any claim in consequence of human authority, can be made upon one man by another . . . exclusively of the duties required by the law of nature, I can conceive of no claim, that one man can make on another but in consequence of his own consent." *Wilson's Works*, ed. Andrews, p. 190. As we have been quoting freely from Pufendorf to show the contractual nature of a conveyance, upon the principles of natural law, and as the doctrines attributed to him by Wilson, in the above quotation, suggest a theory of analytical rather than natural jurisprudence, we would make the following explanation of the apparent discrepancy. Pufendorf did state the doctrine thus attributed to him. At the same time he regarded consent as constitutive of obligations: The law of nature is sanctioned by the command of God. Book 2, chap. viii, sec. 20. By the law of nature certain obligations are born with men, others, which he calls "adventitious," "fall upon men by the intervention of some human deed, not without the consent of the parties. . . . When men have engaged themselves by pacts their nature obliges them as sociable creatures, most religiously to observe and perform them." Book 3, chap. iv, sec. 3. The state is founded upon the social and governmental compacts. Book 7, chap. ii, secs. 6, 7, 8. Civil law does not abrogate natural law. Indeed he says that, when mankind entered into the social compact, "we must suppose that they took it for granted that nothing should be established by the civil law which was contrary to the natural."

tracts, then the writers upon natural law could be considered as furnishing the best authority to be had.

It becomes necessary now, however, to determine more carefully by what law the obligation spoken of in the Constitution is to be determined. By the term "obligation" as used in the "contracts clause," did the framers refer to the obligation as fixed by positive law, that is, by the law of the States, or to the moral obligation, or to the obligation as fixed by the law of nature, then generally assumed to exist, or to the obligation as determined by the established principles of the common law, or to the obligation as determined by the federal courts in the application by them of what might be called a federal common law?

The chief difficulty which arises with reference to the positive law theory of obligation is to determine how a state can obligate itself by a contract when its own law is conceived of as the sole creator and definer of obligation. It will, therefore, be necessary to consider with some care this point.

CHAPTER III

CAN A STATE BE OBLIGATED BY A CONTRACT?

In considering this, the second question raised in *Fletcher v. Peck*, we are confronted by the question, as already suggested, by what law is a state obligated by its contract? Austin laid it down that a sovereign state could not possess legal rights, must less owe legal duties.¹ Might there not be some other law for determining the obligation of a contract to which the framers of the Constitution had reference? Particularly as to the contracts of the States, is there not some superior law which binds the States to their obligations? The answer is at once suggested that the Constitution of the United States is the superior law which creates the obligation. This idea is clearly expressed by Taylor, one of the earlier writers in this country, upon the law of private corporations. He says: "Further, to say that the state, from which emanate most of the rules of law composing the constitution [of a corporation] is a party to the agreement which the constitution embodies, means that the state has done an act whereby it has expressed its intention to bring itself within the operation of some law superior to itself, which thereupon manifests itself in legal relations between the state and the corporation, legal relations which the state cannot alter at its will, since they are the manifestations of a law superior to itself. That paramount law is expressed in the constitution of the United States."² We do not think, however, that this is the correct view of the matter, and for proof thereof would refer to the leading case of *Ogden v. Saunders*.³

¹ Lectures on Jurisprudence, 3d ed., pp. 288-292.

² Taylor on Private Corporations, sec. 448.

³ 12 Wheat. 213.

The question which arose for determination in that case was whether a state insolvency law should be declared invalid as impairing the obligation of contracts in so far as it attempted to discharge debtors from liability upon their contracts, in the case where such contracts were made subsequently to the passage of the law. Several views were taken of this question, which we shall endeavor to state in a very brief way. The majority of the court held that the obligation of a contract is determined by positive law, and hence that no obligation can arise out of any contract which will conflict with that law as it exists at the time the contract is entered into.

The counsel for the defendant contended that the Constitution was the supreme law of the land and that, since it entered into the obligation of a contract as much as the state insolvency law itself did, and since it forbade the impairment of the obligation of contracts, it clearly nullified the operation of the state insolvency law. To this obviously unsound argument Justice Trimble gave the following admirable answer:⁴

The law of the state, although it constitutes the obligation of the contract, is no part of the contract itself; nor is the constitution either a part of the contract, or the supreme law of the state in the sense in which the argument supposes. The constitution is the supreme law of the land upon all subjects upon which it speaks. It is the sovereign will of the whole people. Whatever this sovereign will enjoins, or forbids, must necessarily be supreme, and must counteract the subordinate legislative will of the United States and of the States. But on subjects, in relation to which the sovereign will is not declared, or fairly and necessarily implied, the constitution cannot, with any semblance of truth, be said to be the supreme law. It could not, with any semblance of truth, be said that the constitution of the United States is the supreme law of any state in relation to the solemnities requisite for conveying real estate, or the responsibilities or obligations consequent upon the use of certain words in such conveyances. The constitution contains *no law*, no declaration of the sovereign will, upon these subjects, and cannot, in the nature of things, in relation to them, be the supreme law. Even if it were true, then, that the law of a state in which a contract is made, is part of the contract, it would not be true that the constitution would be part of the contract. The constitution nowhere professes to give the law of contracts, or to declare what shall or shall not be the obligation of contracts. It evidently pre-

⁴ 12 Wheat. 213 at 325-326.

supposes the existence of contracts by the act of the parties, and the existence of their obligation, not by authority of the constitution, but by authority of law; and the preëxistence of both the contracts and their obligation being thus supposed, the sovereign will is announced that no state shall pass any law impairing the obligation of contracts. If it be once ascertained that a contract existed, and that an obligation, general or qualified, of whatsoever kind had once attached or belonged to the contract by law, then, and not till then does the supreme law speak, by declaring *that* obligation shall not be impaired.

This argument seems to us conclusive that the effect of the "contracts clause" is not to make the "obligation of contracts" a creation of federal law. And although the case at hand involved only a private contract, the argument applies with equal force to State contracts, because it is based upon a construction of the very words of the "contracts clause" itself.

Nor did Chief Justice Marshall, who delivered the dissenting opinion, speaking for himself and on behalf of Justices Story and Duval, use any such argument as the one we have just been considering. His argument is founded on the theory that the obligation of a contract does not rest upon positive law, but upon natural law, and is therefore intrinsic in the contract itself, rather than imposed from without. The theory of natural law is elegantly set forth. And the argument is a strong one, not because of the intrinsic soundness of the natural law theory, but from the consideration which Marshall stated in the following manner:

When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose, that the framers of our constitution were intimately acquainted with the writings of those wise and learned men, whose treatises on the laws of nature and nations have guided public opinion on the subjects of obligation and contract. If we turn to those treatises, we find them to concur in the declaration, that contracts possess an original intrinsic obligation, derived from the acts of free agents, and not given by government. We must suppose that the framers of our constitution, took the same view of the subject, and the language they have used confirms this opinion.

Finally, the Chief Justice pointed out that if the view of the majority was correct, the States might pass acts declar-

ing that all contracts should be subject to legislative control, and should be discharged as the legislature might prescribe, which would thereupon be a condition upon which every contract would thereafter be made; "thus, one of the most important features in the constitution of the United States, one which the state of the times most urgently required, one on which the good and wise reposed confidently for securing the prosperity and harmony of our citizens, would be prostrate, and be construed into an inanimate, inoperative unmeaning clause." He also made this pertinent suggestion: "Had the intention been to confine the restriction to laws which were retrospective in their operation, language could have been found and would have been used to convey this idea."

The argument thus made is, in itself, a telling one. The "Fathers" were versed in the law of nature and of nations and did hold to its principles. Remembering that fact, and viewing the language of the "contracts clause" literally, one is disposed to come to the same conclusion that the Chief Justice did.⁵ "This argument," said Justice Trimble, referring to that of the Chief Justice, "struck me, at first, with great force." Three of the four majority justices, indeed, distinctly recognized that there was a natural law which sanctioned the obligation of contracts.

The difficulty with Marshall's argument was that it could not be applied to the existing state of things. The *reductio ad absurdum* which follows from endeavoring to apply it is the best kind of proof, not that the "Fathers" did not believe in natural law, nor that they did not intend to refer to the "natural" obligation of contracts, but that the natural law theory is fallacious and will not work. Thus, it was asked, how, if the "natural" obligation of all contracts was guaranteed by the Constitution, could a State pass stat-

⁵ We shall, hereafter, review the evidence which can be adduced to show what the intention of the framers was in regard to the "contracts clause," and also to show how much of this evidence Marshall could have had to guide him in reaching the decisions we are reviewing.

utes of limitations, statutes of frauds, statutes forbidding usury contracts, gambling contracts, contracts by persons under twenty-one years of age? Marshall answered that statutes of frauds, registration acts, etc., did not impair the obligation, rather they simply prescribed forms and rules of evidence, and that statutes of limitations act upon the remedy, not upon the obligation. Both of these points seem well taken, but when he argues in favor of the validity of usury laws: "They declare the contract to be void in the beginning. They deny that the instrument ever became a contract. They deny it all original obligation and cannot impair that which never came into existence," when he allows to the state the right "to regulate contracts, to prescribe the rules by which they shall be evidenced, *to prohibit such as may be deemed mischievous*,"⁶ it seems that the majority had good reason for saying that he thereby surrendered his whole argument. If a State can forbid any contract it deems mischievous, it takes a good deal of searching to discover the remains of any obligation, in the natural law sense, still protected by the federal Constitution. If it can forbid entirely the making of contracts, it can surely attach to them the condition that they shall be subject to be discharged upon the insolvency of the debtor being established after proceedings taken.

The position of the majority clearly is, therefore, that the civil obligation of contracts, at least when it is clearly and positively declared, is the paramount obligation, and is the one that the Constitution protects.

But they do not deny the existence of a natural obligation and its operation in certain cases. It may be that the "obligation" of a "contract" between a State of the Union and one of its citizens is founded on natural rather than municipal law. At any rate, it is desirable to understand more clearly the views of the majority in so far as they bear upon this question. Justice Washington, speaking of the universal law of civilized nations, says:

⁶ Italics ours.

I, therefore, feel no objection to answer the question asked by the same counsel—what law is it which constitutes the obligation of the compact between Virginia and Kentucky? by admitting, that it is the common law of nations which requires them to perform it. I admit further, that it is this law which creates the obligation of a contract made upon a desert spot, where no municipal law exists and (which was another case put by the same counsel) which contract, by the tacit assent of all nations, their tribunals are authorized to enforce. . . . Whilst I admit, then, that this common law of all nations, which has been mentioned, may form in part the obligation of a contract, I must unhesitatingly insist, that this law is to be taken in strict subordination to the municipal laws of the land where the contract is made or is to be executed.⁷

Justice Johnson's ideas are found expressed in the following quotation:

Right and obligation are considered by all ethical writers as correlative terms. . . . The obligation of every contract will then consist of that right or power over my will or actions, which I, by my contract, confer on another. And that right and power will be found to be measured neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three,—an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law. The constitution was framed for society and an advanced state of society . . . in which I will undertake to say that all the contracts of men receive a relative, and not a positive interpretation: for the rights of all must be enjoyed in subserviency to the good of the whole. The state construes them, the state applies them, and the state decides how far the social exercise of the rights they give us over each other can be justly asserted.⁸

Justice Thompson did not discuss the question whether, in regard to State contracts, there was an obligation arising from natural law. He was contented with viewing the obligation as the creature of municipal law, and confined himself to the contract at hand. Justice Trimble's conception was as follows:

I admit, that men have, by the laws of nature, the right of acquiring, and possessing property, and the right of contracting engagements. I admit that these natural rights have their correspondent natural obligations. I admit, that, in a state of nature, when men have not submitted themselves to the controlling authority of civil government, the natural obligation of contracts is co-extensive with the duty of performance. This natural obligation is founded solely in the principles of natural or universal law. . . . This natural obligation exists among sovereign and independent states and nations, and amongst men, in a state of nature, who have no common supe-

⁷ 12 Wheat. 213 at 258-259.

⁸ 12 Wheat. 213 at 281-282.

rior, and over whom none claim, or can exercise, controlling legislative authority. But when men form a social compact, and organize a civil government, they necessarily surrender the regulation and control of these natural rights and obligations into the hands of the government. I think it incontestably true that the *natural* obligation of *private* contracts between individuals in society, ceases, and is converted into a *civil* obligation, by the very act of surrendering the right and power of enforcing performance into the hands of the government.

As, in a state of nature, the natural obligation of a contract consists in the right and potential capacity of the individual to take or enforce the delivery of the thing due to him by the contract, or its equivalent; so, in the social state, the obligation of a contract consists in the efficacy of the civil law, which attaches to the contract, and enforces its performance, or gives an equivalent in lieu of performance. From these principles it seems to result as a necessary corollary, that the obligation of a contract made within a sovereign state, must be precisely that allowed by the law of the State and none other. I say, *allowed*, because if there be nothing in the municipal law to the contrary, the civil obligation being, by the very nature of government, substituted for, and put in the place of, natural obligation, would be coextensive with it; but if by positive enactments, the civil obligation is regulated and modified so as that it does not correspond with the natural obligation, it is plain, the extent of the obligation must depend wholly upon the municipal law.⁹

Story, in his Commentaries, expresses his understanding of the obligatory nature of state contracts in the following manner:

Nor is this obligatory force so much the result of the positive declaration of the municipal as of the general principles of natural or (as it is sometimes called) universal law. . . . Nay there may exist (abstractly speaking) a perfect obligation in contracts where there is no known and adequate means to enforce them. As, for instance, between independent governments. . . . So in the same government, where a contract is made by a State with one of its own citizens, which yet its laws do not permit to be enforced by any action or suit. In this predicament are the United States who are not suable on any contracts made by themselves; but no one doubts that these are still obligatory on the United States. Yet their obligation is not recognized by any positive municipal law, in a great variety of cases. It depends altogether upon principles of public or universal law. . . . The civil obligation of a contract, then, though it can never exist contrary to positive law, may arise or exist independently of it, and it may exist notwithstanding there may be no present adequate remedy to enforce it.¹⁰

These quotations show how strong was the influence of the natural law theory during the period when the meaning of the "contracts clause" was being outlined. It will be

⁹ 12 Wheat. 213 at 319-320.

¹⁰ Story on the Constitution, sec. 1381, p. 251.

well to remember, in reading *Fletcher v. Peck*, and *Dartmouth College v. Woodward*, that Marshall felt that the obligation of a contract was not dependent on any narrow and technical considerations, but on the broad basis of natural right and justice. And even when the rest of the court disagreed with him and, being forced by the circumstances of the case to choose between positive and natural law, he stood out for the supremacy of positive law, they did not deny the existence of a law of nature. It is difficult to state exactly what position the majority of the court took in *Ogden v. Saunders* in regard to the obligation of contracts made between a State and one of its citizens. The question was not immediately before them. All the justices admitted the existence and validity of natural law. As to private contracts, civil law supersedes natural law, but it impliedly adopts the principles of natural law unless it expressly enacts otherwise. It is fair to assume that they either regarded a state as bound by its contracts with its citizens by the sanction of natural law alone, or that the municipal law has impliedly adopted the principles of natural law in this matter.

Defenders of natural law obviously would not find the trouble that the Austinians have found in holding that a sovereign state may be obligated by its contract. For this the authority of James Wilson, the reputed author of the "contracts clause," may be cited. Thus he says, speaking of the state:

It is an artificial person. It has its affairs and its interests; it has its rules; it has its obligations; and it has its rights. It may acquire property, distinct from that of its members; it may incur debts, to be discharged out of the public stock, not out of the private fortunes of individuals: it may be bound by contracts and for damages arising *quasi ex contractu*.¹¹

So also Pufendorf says: "That no Prince hath power to release himself from his oath, when there lies no objection either against the validity of his taking it, or the matter contained in it, or the circumstances belonging to it, upon pre-

¹¹ Wilson's Works, ed. Andrews, p. 272.

tence that it is lawful for him to relieve his subjects in some particular oaths, I think is evident. For the oaths which he has power to vacate in his subjects have always this condition annexed to them *if it please the sovereign*. And 'tis certain it would be impossible to bind any obligation upon a man if he reserves to himself a power to break from it whenever he thinks fit." Further he says: "and therefore upon the whole all contracts made by the prince oblige the commonwealth, unless they are manifestly absurd or unjust. And when the case is doubtful 'tis always to be presumed in favor of the prince. . . . And so whatever a free people contract, devolves upon and obliges the person they afterwards confer sovereignty upon, though they give him never so full and absolute a power."¹²

We have seen, therefore, that it was the natural law theory of the obligation of a contract that was looked to as furnishing the test of the obligation of state contracts, and that, upon this theory, an obligation exists entirely irrespective of the legal omnipotence—the sovereignty—of one of the contracting parties. The English Parliament could be as completely obligated by its contract as any of our state legislatures by theirs. It is therefore clear that the criticism so often made of the Dartmouth College case, that the English Parliament could not have been obligated by any contract in connection with the grant of the college charter, is entirely beside the point. The argument is a valid one, when it is used to show that no contract could have been intended, under the well understood principles of law existing when the charter was granted; but if it is attempted to go farther, and to say that there could not possibly have been any contract, because of the legal omnipotence of Parliament, we think the argument overlooks the meaning which the court has attributed to the word "obligation." And we would further point out that, except in so far as the legislatures of the states are restrained by constitutional provisions of their own, they are as legally omnipotent as Parlia-

¹² Law of Nature and Nations, Book 8, chap. x, sec. 3, pp. 865-866.

ment, and if Parliament cannot obligate itself, they are equally as incapable of binding themselves by contract.

If the federal courts do, as a matter of practice, construe state contracts by applying principles of natural right and justice, it becomes a matter of no practical importance whether we allow these principles an independent authority or regard them as impliedly adopted by the municipal law of the States. The only difference which one would imagine might result would be an increased respect for the decisions of the state courts, if the question to be decided is avowedly one of state law. The attitude of the federal courts towards state decisions, in this class of cases, is indeed one of great independence, but this does not necessarily lead to the conclusion that the federal courts do not rest the obligation of contracts upon state law. In the first place this independence of judgment is asserted even where the determination of the obligation of a contract necessitates a construction of the state constitution or statutes.¹³ In the second place, in cases where the federal jurisdiction is based upon diversity of citizenship, and where it is generally admitted, therefore, that the federal courts are applying state law, these courts may exercise an independent judgment as to what the state law is; and in matters of commercial law and general jurisprudence they consider themselves peculiarly free from any obligation to follow state decisions.¹⁴

An interesting case that comes rather close to settling the theoretical question we are discussing and which yet does not quite do so, is *Douglas v. Kentucky*,¹⁵ where the court refused to apply the rule it had previously established that "if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action

¹³ *Jefferson Branch Bank v. Skelly*, 1 Black, 426.

¹⁴ *Burgess v. Seligman*, 107 U. S. 20; *Swift v. Tyson*, 16 Pet. 1.

¹⁵ 168 U. S. 488.

of legislation, or decision of its courts altering the construction of the law.¹⁸

Here the facts were that the legislature had granted a lottery privilege to a municipality, which had sold it to a private individual. Before the latter resold it, there had been a decision of the highest court of the State holding that a grantee or his assigns who invested money on the faith of a lottery grant, acquired a legal right thereto, and, in addition, a *quo warranto* had been issued against the purchaser of the lottery in dispute and had been decided in favor of the owner. On the strength of these decisions the plaintiff purchased the lottery. Later a repealing act was passed. The Court of Appeals of Kentucky reversed itself and allowed the repealing act to stand, and an appeal was taken to the United States Supreme Court. Thus, the case contained facts which brought it completely within the rule laid down by Taney in *Life Insurance Co. v. Debolt*, and adopted by the whole court in *Gelpcke v. Dubuque*. There was the prior state decision holding that a lottery franchise was a valid contract; there was a purchase made on the faith of that decision, whereby the purchaser and the state, on the doctrine of novation, entered into a new contract; there was a subsequent reversal of the former decision by the state court, and an application by the state court of a statute repealing the grant. Had the question been considered to be only whether or not, at the time the plaintiff purchased the lottery, the state law regarded him as obtaining a legal title thereto good as against the State, as acquiring a legal right that the lottery grant should not be repealed, it should have been answered in the affirmative, certainly if the rule of *Gelpcke v. Dubuque* was to be applied. But the court refused to apply the rule of *Gelpcke v. Dubuque*. The court said: "The defendant insists that his rights having been acquired when these decisions of the highest court of Kentucky were in full force, should be protected according

¹⁸ *Life Insurance & T. Co. v. Debolt*, 16 How. 416; *Gelpcke v. Dubuque*, 1 Wall. 175.

to the law of the state as it was adjudged to be when those rights attached. But is this court required to accept the principles announced by the state court as to the extent to which the contract clause of the Federal Constitution restricts the powers of the state Legislature? Clearly not. . . . This court must determine—indeed it cannot consistently with its duty refuse to determine—upon its own responsibility, in each case as it arises, whether that which a party seeks to have protected under the contract clause of the Constitution of the United States is a contract the obligation of which is protected by that instrument against hostile state legislation.”

The rule of *Gelpcke v. Dubuque and Life Insurance Co. v. Debolt* is rather clearly based on the idea that the validity and obligation of the contract is determined by state law, and for this reason the decisions in force at the time of the formation of the contract are to be regarded as fixing its obligation. It is difficult to say, however, whether Justice Harlan refused to regard those decisions, on the ground that the federal court was not administering state law at all, or simply upon the ground that the rule of *Gelpcke v. Dubuque* was a rule of policy, which did not obviate the duty incumbent upon the court of exercising an independent judgment and, when the occasion required, of making an exception to the rule.

As to what contracts the States may make and what they may not make, the Supreme Court has made a number of somewhat varied rulings. From the nature of the case, it is difficult to draw a line between contracts which the States may make and those which they may not make. In the *Ohio Bank Tax cases*¹⁷ in which the question of the validity of contracts as to exemption from taxation was reargued, the majority simply argued that the power of a state to contract was a result of its sovereignty, and that to deny it this power was to deny it its sovereignty. The court has, how-

¹⁷ *Piqua Branch Bank v. Knoop*, 16 How. 369, and *Ohio Life Insurance Co. v. Debolt*, 16 How. 416.

ever, held that the States cannot contract away their power¹⁸ of eminent domain, or their police power,¹⁹ nor any of their power to supervise and regulate the forms of administering justice.²⁰ A State cannot contract concerning governmental subjects, hence it cannot contract with the citizens of a town that, upon fulfilling certain conditions, it will establish the county-seat at that place.²¹ Land under navigable waters cannot be alienated except in parcels which can be disposed of without detriment to the public interest in the lands and waters remaining.²² On the other hand, perpetual corporate, ferry, turnpike, gas, water, railroad and street railway franchises have been held to be contracts within the protection of the "contracts clause." These privileges may be made exclusive as well. Finally, the State may grant exemptions from rate regulation at the hands of the legislature.²³

Obviously the court has not been particularly consistent in its rulings as to what may and what may not be the subject of contracts by the States. But upon principles of natural law or general jurisprudence there is abundance of room for differences of opinion as to the proper limits of the power of states to contract. That even the writers upon natural law placed some limits upon the right of the state to contract may be seen from a rather interesting passage from Pufendorf. He says:

What hath been said of the contracts of princes may also be said of their grants and donations, viz: that they cannot be recalled by the successors where they were made upon fair and reasonable reasons. . . . What hath been said with relation to grants may also be applied to privileges and immunities, namely, that it ought to be considered upon what reasons and with what moderation and caution they were given, and whether they were consistent with the peace and security of the state, for without dispute, these things are of far greater concern than the unwary easiness of the prince. And

¹⁸ *Cincinnati v. Louisville & N. R. Co.*, 223 U. S. 390.

¹⁹ *Stone v. Mississippi*, 101 U. S. 814.

²⁰ *Bank of Columbia v. Okely*, 4 Wheat. 235, 245; and *Cairo, etc. R. Co. v. Hecht*, 95 U. S. 168.

²¹ *Newton v. Commissioners*, 100 U. S. 548.

²² *Illinois Central R. Co. v. Illinois*, 146 U. S. 387.

²³ See the special chapters on franchises and rate exemptions.

indeed all privileges are to be confined under such limitations whenever they begin to lie heavy upon the other subjects.²⁴

It is apparent that in determining, in a concrete case, whether or not a contract with the state exists, as, for example, in the case of the grant of corporate privileges, the theory and practice upon the subject of state contracts must be given some consideration, even if the ultimate sanction of the contract be natural or universal law. The reason is that natural law only renders obligatory that to which the parties intend to bind themselves, and in a state whose municipal law has never recognized any contractual relation between the state and its grantee in the granting of corporate franchises, it would be difficult to say that a contract was intended by the parties. Hence, in considering the Dartmouth College case, it will be necessary to examine the doctrines of the common law and the established parliamentary precedents in regard to corporate grants before it can fairly be determined whether an obligatory contract, even upon principles of natural law, was created by the grant.

Before beginning the discussion of that case, however, it is desirable to see what are the essentials of an obligatory state contract upon positive law principles alone, for modern jurists generally agree that it is proper to speak of a state being obligated by a contract merely under the sanction of its own municipal law.

Recognizing the fact which we have already stated, that obligation is the legal relationship between the parties, that it is, from one point of view, the legal duty owed by one person to another, and from another point of view, the legal right or power which that other has to control the actions of the first, and recognizing that this right and duty are the creatures of law, Austin laid it down that the state, which was the source of all law, could not be limited or bound by law, and therefore could owe no legal duties, could be sub-

²⁴ Pufendorf, p. 867.

ject to no legal obligations.²⁵ In fact, he held that it could possess no legal rights. This opinion is likewise held by Markby²⁶ and by Amos,²⁷ and it may be found in one, at any rate, of the decisions of the Supreme Court of the United States, for, in *Kawanaoka v. Polybank*,²⁸ Justice Holmes, in extending the doctrine of the non-suability of the state to protect the government of the territory of Hawaii, explained the theory as follows: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

Recent writers have shown very clearly, however, that the subject may have rights as against the sovereign, because that which makes any other right a legal right is merely its recognition as such by the sovereign; if, therefore, the sovereign recognizes the existence of rights as against itself, these rights are legal rights. There is no higher sanction to any legal right than this.²⁹ So Brown says, in his work, *The Austinian Theory of Law*: "Sovereignty does not preclude the notion of obligation, but only the notion of limitation by a power external to itself." Pollock says: "In practice, individual citizens may count on the submission of the State to its own tribunals (whatever the extent of it may be) not being arbitrarily revoked. The security is the same, in the last resort, that we have for the due administration and enforcement of the ordinary law binding on subjects." Salmond is so excellent upon this point that we shall quote his argument in full. He says:

A subject may claim rights against the state, no less than against another subject. He can institute proceedings against the state for the determination and recognition of these rights in due course of

²⁵ Austin, *Jurisprudence*, 3d ed., pp. 288-292.

²⁶ Markby, sec. 154, p. 92.

²⁷ Amos, *Science of Jurisprudence*, p. 77.

²⁸ 205 U. S. 349.

²⁹ See Pollock, *First Book of Jurisprudence*, p. 63 ff.; Brown, *The Austinian Theory of Law*, p. 194; Salmond, p. 202 ff.; Holland, p. 126.

law, and he can obtain judgment in his favor, recognizing their existence or awarding to him compensation for their infringement. But there can be no enforcement of that judgment. What duties the state recognizes as owing by it to its subjects, it fulfills of its own free will and unconstrained good pleasure. The strength of the law is none other than the strength of the state, and cannot be turned or used against the state whose strength it is. The rights of the subject against the state are therefore imperfect. They obtain legal recognition but no legal enforcement.

The fact that the element of enforcement is thus absent in the case of rights against the state has induced many writers to deny that these are legal rights at all. But as we have already seen, we need not so narrowly define the term legal right, as to include only those claims that are legally enforced. It is equally logical and more convenient to include within the term all those claims that are legally recognized in the administration of justice. All rights against the state are not legal, any more than all rights against private persons are legal. But some of them are; those, namely, which can be sued for in courts of justice, and the existence and limits of which will be judicially determined in accordance with fixed principles of law, redress or compensation being awarded for any violation of them. To hold the contrary and to deny the name of legal right or duty in all cases in which the state is the defendant is to enter upon a grave conflict with legal and popular speech and thought. In the language of lawyers, as in that of laymen, a contract with the state is as much a source of legal rights and obligations as is a contract between two private persons; and the right of the holder of consols is as much a legal right, as is that of a debenture holder in a public company. It is not to the point to say that rights against the state are held at the state's good pleasure, and are therefore not legal rights at all; for all other legal rights are in the same position. They are legal rights not because the state is bound to recognize them, but because it does so.

Whether rights against the state can properly be termed legal depends simply on whether judicial proceedings in which the state is the defendant are properly included within the administration of justice. For if they are rightly so included, the principles by which they are governed are true principles of law, and the rights defined by these legal principles are true legal rights. The boundary line of the administration of justice has been traced in a previous chapter. We there saw sufficient reason for including not only the direct enforcement of justice but all other judicial functions exercised by courts of justice. This is the ordinary use of the term and it seems open to no logical objection.

And a further quotation from Brown will, perhaps, aid in understanding the matter:

If a sovereign, having laid down a law that contracts shall be enforced, enters into contracts with its own subjects, and if those contracts are enforced as a matter of fact by its courts even as against the sovereign, then it is impossible to deny that the sovereign is under a legal duty towards its subjects. We cannot refuse to describe the sovereign's liability as a legal duty on the ground that the sanction is self imposed, if as a matter of fact the sanction is

invariably admitted by the sovereign, and applied by the courts. Austin's failure to recognize the fact is a conclusive illustration of the need for revising his theory of sovereignty.²⁰

So, also, Holland says:

Indeed it is not improper to talk of the state as having duties, namely such as it prescribes to itself, though it has the physical power to disregard and the constitutional power to repudiate them. Such duties as we often see enforced, e.g. in England, principally, but not exclusively by a Petition of Right, which is lodged with the Home Secretary, and, after due investigation, receives, in suitable cases, the Royal *fiat* "let right be done." The subsequent proceedings follow the course of an ordinary action. This remedy is inapplicable in cases of tort.²¹

Although this, the latest view of modern jurists, allows that the state may be under legal obligations, and goes far toward supporting the doctrine that a legally omnipotent legislature is obligated by its grant of lands or franchises, there is, nevertheless, a certain difficulty in applying the conception to the concrete case of a grant by the state.

Although these same jurists deny that a grant is, generally speaking, a contract, nevertheless, we have seen that, for the purposes of the "contracts clause" it is to be so regarded, and that the only way in which it can be so regarded is by implying an agreement not to revoke the grant. Now there is no legal procedure in any state, whose government is organized without constitutional limitations, by which any such contract can be recognized, let alone enforced. That is to say, Parliament, for example, has provided for a legal recognition as against itself, of the obligation which it creates when it agrees to pay a certain sum of money at a certain time. It has not provided for any direct legal recognition of the specific contract not to repeal a franchise granted or a land grant made. The point, of course, is a rather finely drawn one. We think it correct to say, however, that, in the eye of the law, to-day as well as in Blackstone's time, the legal title which an individual has to a piece of land conveyed to him by the state is as

²⁰ Brown, *The Austinian Theory of Law*, p. 194.

²¹ Holland, *Jurisprudence*, 10th ed., p. 126.

strong as that which he has to a similar piece of land conveyed to him by another individual. And we think it probably correct to say that, in Blackstone's time, a grant of franchises by the Crown or by Parliament was regarded as conveying legal rights—legal rights, the court would have said, had it been possible to bring the abstract question before them, even as against Parliament. In this case, we think it correct to say that state grants give rise, by municipal law, to legal rights against the state: (and, if the grant be regarded as a contractual relation, that the right of the individual and the corresponding duty of the state may properly be spoken of as a legal obligation).

The principal question, then, in the Dartmouth College case, must be whether or not corporate charters—at least the charters of colleges—were regarded, at the time of the grant in question, as a species of private property. This inquiry is of almost equal importance whether the existence of the obligation is to be determined by natural or municipal law. Finally, it may be noted that, in a state whose government is organized with a legally omnipotent Parliament, as is England, it may well be that the question of the inviolability of private property or of state grants can not be determined entirely by reference to the law as administered by the courts. Reference must also be made to the actual practice of the sovereign body which, perhaps as much as anything else, will show the nature of the rights of individuals.

CHAPTER IV

THE DARTMOUTH COLLEGE CASE

We have reserved for consideration in this chapter the most famous of all the cases dealing with the "contracts clause"—*Trustees of Dartmouth College v. Woodward*.¹

The broad constitutional question involved in that case was whether a charter of incorporation constituted a contract within the protection of the "contracts clause" of the United States Constitution. But this was by no means the only question that had to be decided. Those who have found fault with the most important principle there laid down have also tried to discredit the decision by pointing out errors of law in regard to other points involved, and errors in the statement of facts, each of which, they contend, are sufficient to have caused a reversal of the whole decision. The case, therefore, cannot be fairly discussed, nor really understood, without some consideration of these collateral questions.

Dartmouth College was incorporated by a charter from the Crown (signed in behalf of the king by Governor Wentworth of New Hampshire) granted in 1769. It cannot be gainsaid that, in the year 1816, and ever since its incorporation, practically, Dartmouth College had been a "going concern," with lands, buildings, trustees, faculty and students, all located in what was, after 1776, the State of New Hampshire. In the year 1816, the legislature of New Hampshire passed three laws amending the charter of the college so as to change its name to "The Trustees of Dartmouth University"; to change the number of trustees from twelve to twenty-one, of whom nine should constitute a quorum; to provide that the nine new trustees be appointed by the

¹ 4 Wheat. 518.

Governor and Council; to provide for a board of overseers of twenty-five members, appointed by the Governor and Council, with power to veto the acts of the trustees relative to the appointment of the president and faculty and to other administrative matters; to provide that each of the two boards should have power to remove any of their members; and to give the trustees power to organize colleges in the university. These remarkable amendments, it will easily be perceived, were drawn up to accomplish a particular purpose. There had been a schism in the old board of trustees. The rock upon which the board had split, by a vote of eight to four, was the president of the college, Dr. John Wheelock, son of the founder. The history of the events leading up to the passage of the amending acts is interesting. As recited by Shirley, in the work already referred to, it shows the spread of the controversy until, from a quarrel among the Trustees of Dartmouth College, it assumed the shape of a state-wide political controversy, the sides of which were taken by the Federalists and the Anti-Federalists respectively,² but all this is immaterial to a discussion of the case from a legal standpoint.³ It will suffice to point out that the addition of the nine new trustees was evidently intended to turn the party of the minority into the party of the majority. The old trustees refused to accept the amendments and removed Woodward, the secretary and treasurer of the corporation, who joined the camp of the enemy, taking with him the seal and record books of Dartmouth College, and was made secretary and treasurer of the newly organized "Dartmouth University." The old trustees thereupon brought an action of trover in the name of the old corporation to recover their seal and records from Wood-

² According to Shirley in his work entitled "The Dartmouth College Causes," which is accepted by H. C. Lodge in his *Life of Daniel Webster*.

³ It has been contended that the decision was chiefly due to the political aspect of the case, which Webster astutely played upon in his argument before the Supreme Court—Lodge, *Life of Webster*, p. 89—but this inference, of course, cannot with fairness be drawn before the legal questions have been examined.

ward, and this action it was that was brought before the Supreme Court. It was contended before that court that the acts of 1816 impaired the obligation of the contract contained in the charter.

It is important to set out the facts in slightly more detail, particularly the circumstances surrounding the grant of the charter, inasmuch as Mr. Shirley, in his book entitled "The Dartmouth College Causes," already referred to, has challenged the statement of facts which Chief Justice Marshall made in delivering his opinion as erroneous and intentionally misleading, and as giving an entirely different aspect to the case from that which it would otherwise have had.

The facts of the case were found by a special verdict of the jury (which really was agreed upon by stipulation between counsel), which is set out in full in Wheaton's report. It was upon these facts that the case came before the Supreme Court. The verdict began by setting forth the charter which, as usual, set out in the preamble the facts which induced the Crown to make the grant. The essential facts there set out are: That the Reverend Eleazer Wheelock had, many years before, set on foot, at his own expense and on his own estate, an Indian Charity School. Others had lent pecuniary assistance and the school had prospered to such an extent that it was thought advisable to raise funds in England, which was done, the funds being placed in the hands of certain trustees residing there. It further recited that Wheelock represented that he had authorized the English trustees to select a fitting location for the school, and had set before them the offers of grants of land that had been made by several of the governments in America; that a large number of proprietors of lands in western New Hampshire, considering that such a location would be advantageous for carrying out the work among the Indians, "and also, considering, that without the least impediment to the said design, the same school may be enlarged and improved to promote learning among the English, and be a means to supply a great number of churches and congre-

tions, which are likely soon to be formed in that new country, with a learned and orthodox ministry, they the said proprietors have promised large tracts of land, for the uses aforesaid, provided the school shall be settled in the western part of our said province"; that the English trustees chose the same location; and that "the said Wheelock has also represented the necessity of a legal incorporation, in order to the safety and well being of said seminary, and its being capable of the tenure and disposal of lands and bequests for the use of the same." The charter then proceeded to incorporate Dartmouth College, making it "from henceforth and forever" a body corporate and politic, and giving the necessary corporate powers to carry out its purpose of instructing and educating the youth of the Indian tribes as shall appear necessary and expedient for civilizing and christianizing children of pagans, and also for the education of English youth and any others, including the power to appoint professors, tutors and various officers usually connected with such institutions, and to grant such degrees as were usually granted in either of the universities, or any other college of the realm of Great Britain. The officers, it was declared, might exercise their authority "as fully and freely as any of the officers and ministers in our universities or colleges in our realm of Great Britain lawfully may or ought to do." Eleazer Wheelock was recited to be the founder of the institution and was appointed its first president, with power to appoint his successor, who might, however, be removed by the trustees. It was made the duty of the president, in order that the English contributors might "be satisfied that their liberalities are faithfully disposed of," to transmit annually to the Trustees in England an account of the disbursements of the sums which he should receive from the donations and bequests made in England. The verdict then set out the acceptance of the charter, and that immediately after its organization the corporation received by gift, devise and otherwise lands, chattels and money, and that among the gifts to the college were a grant

of lands from the State of Vermont, in 1785, and two from the State of New Hampshire, in 1789 and 1807. The amending statutes are then set out and the proceedings involved in the action at hand are given, as we have already recited them.

From this statement of facts, found in the special verdict, it is clear that the purpose was to incorporate Moor's Indian Charity School, and that the method was to create an incorporated college and have the school funds transferred to it; and this is exactly the view that Marshall takes in his opinion.

Mr. Shirley, however, endeavors to show that the facts were quite different, and that the Chief Justice was well aware that they were. His argument on this point is, of course, based wholly on facts outside the record, nor is it clear that Marshall really knew of them. Nevertheless, we have endeavored to ascertain their importance, assuming, for the sake of argument, that they had been in the record.

Mr. Shirley marshalls the evidence and argues the matter at such length⁴ that it will be impossible for us to do anything more than to state our conclusions, reached after reading his statement. He contends that Moor's Indian Charity School and the college were always regarded as separate institutions, even after the incorporation; that all the funds had been raised, prior to the incorporation, belonged to the school and were never given to the college; and that the first gift to the college was a large grant of land made by Governor Wentworth, in behalf of the Crown, in January, 1770, thus making the foundation of the institution a public one.

What Mr. Shirley does show, we think, is that the original intention (which is plainly shown in the preamble to the charter already set out) was to incorporate the charity school, with the idea that it would eventually broaden its operations—hence the name "college"; that the English trustees did not take kindly to these doings of Dr. Whee-

⁴ Shirley, *The Dartmouth College Causes*, p. 20 ff., p. 412 ff.

lock, and that he, therefore, promised that the school funds should be kept separate, as before, and that the president of the school who, he said, was not necessarily the president of the college, should have the sole administration of the funds. As a matter of fact, the school funds must have been given to the college, as there was no such legal person as the school, and, in fact, we are told that gifts, which had been made to the school upon condition that it be incorporated, were called for immediately after the charter was granted. In 1807 we find the legislature passing an act which, after reciting that it had always been considered that the school and the college were separate branches of the same institution, with separate funds, and that the president of the college "ever has been and ever should be" president of the school, but that the trustees had never considered that they had any official right to be concerned in the application of the funds of the school, proceeds to associate the trustees with the president in that office. It is perfectly clear, therefore, that, legally, there never had been more than one institution, namely, Dartmouth College, and that Dr. Wheelock was taking an impossible position when he told the English trustees that the school funds were controlled by the president of the school, who was not, necessarily, president of the college. Mr. Shirley does show, however, that one of the first gifts to the college was a large grant of land by the Crown. Litigation threatened to arise later over the right of the Crown to make this grant, and the college therefore surrendered it, taking, two years afterwards, in 1789, the grant referred to in the special verdict as a substitute for the prior doubtful grant. This lends a semblance of validity to the claim made by Mr. Shirley that the foundation was a public one in the sense of the rule stated in Blackstone that, if the king and a private man join in endowing an eleemosynary foundation, "here the king has his prerogative," and therefore "the king alone shall be the founder of it."⁵ It would seem probable that, in such

⁵ Blackstone, 481.

a case, the king would have had the visitatorial power to the same extent as a private founder, and that, after the Revolution, this power might be said to have become vested in the state legislature—though in the case of so-called “civil” corporations, of which the king was always considered the founder, it was laid down that his visitatorial power could only be exercised by the court of King’s Bench.⁶ But it would be a question for serious consideration whether the visitor would have had the right to do what the legislature had attempted to do in the case of Dartmouth College.

The rules relating to the power of visitation were very technical, but, in view of the fact that the charity school was already founded and in existence and that the charter was intended to incorporate this school, and particularly, in view of the fact that Dr. Wheelock is named in the charter as the founder, thus evidencing an intention on the part of the Crown to waive its prerogative in the matter, we do not think the argument would have been applicable had all the facts which Mr. Shirley sets out appeared in the record.

Further criticisms of the statement of facts, as, for instance, that there was no formal application such as was suggested by Marshall’s statement that there was an “application” made for a charter, are not of enough moment to need answering. It has also been pointed out that the power of giving degrees and the powers of the officers of the college were recited to be as comprehensive as those of the universities in England, with the object of proving that the College was really a university, and of following this up by showing that the universities were public corporations. It has already been shown, however, that there was no grand division of corporations, at common law, into public and private.

Having considered the questions which have arisen from the special circumstances surrounding the granting of this particular charter, it remains to consider the fundamental question of the case, namely, what was the status of cor-

⁶ 1 Blackstone, 481.

porations at common law? Did the municipal law of England regard corporate franchises in the same light as it regarded other kinds of property? Can these grants fairly be said to have been considered to be contracts, according to the principles of the common law? And if it cannot quite be said that, upon common law principles, they were contracts, could it be said that they were contracts upon the principles of natural or universal law?

The fundamental principles of the law of corporations as they appear, practically unchanged, during the latter half of the eighteenth and the first half of the nineteenth centuries may be found in Blackstone's Commentaries, published in 1762; in Wooddeson's Lectures on the Laws of England, published in 1783; in Kyd on Corporations, published in 1793; and in Grant on Corporations, a work published somewhat later than these three (1850), yet which contains, practically unaltered, all the old law on this subject.

Referring to these authorities, we find that, as between the Crown and the recipients of its grants of corporate powers, the charter became a private, vested right. This plainly appears from the doctrines: that a charter is of no effect until it is accepted by the incorporators; that a new or amended charter is not effectual until it is accepted by the corporation;⁷ and that the Crown cannot dissolve a corporation.⁸ Grant says:

The general principle of law with respect to grants being that the Crown cannot derogate from its own grant, it follows that when a charter has once been granted and accepted, the king cannot afterwards interfere with the operations of the provisions of it, or with the privileges, rights and liabilities that are incident to a corporation.⁹

In the leading case of *The King v. Passmore*,¹⁰ Buller, J. said:

I do not know how to reason on this point better than in the manner urged by one of the relator's counsel, who considered the grant of incorporation to be a compact between the Crown and a

⁷ Grant on Corporations, pp. 18, 19.

⁸ *Ibid.*, p. 10; 1 Blackstone, 485.

⁹ Grant, p. 33.

¹⁰ 3 T. R. 246.

certain number of subjects, the latter of whom undertake, in consideration of the privileges which are bestowed, to exert themselves for the good government of the place.

Again, it may be pointed out that a corporation is spoken of by Blackstone as a franchise.¹¹ A franchise, moreover, is classed as an incorporeal hereditament, that is, as property. The whole law of corporations is treated by Blackstone and other writers as a part of private law. Liberties, franchises and privileges were among the things mentioned in Magna Charta, of which a freeman should not be dis-seized, but by the judgment of his peers or the law of the land.¹²

The inference is, without doubt, clearly and strongly warranted that the franchise of being a corporation was a private, property right, and that, as such, it was regarded as sacred, as much guaranteed against parliamentary confiscation as any other property right of an individual, and hence, upon the principles of natural or universal law, nay, even upon the principles of the common law itself, could fairly be regarded as a contract, binding upon Parliament as well as upon the Crown. Clearly, the burden is shifted upon him who would prove the contrary.

These rules of the common law seem to furnish the only solid foundation for the court's decision, yet they receive quite varying treatment at the hands of the three Justices who delivered opinions in the case. Justice Washington relies on these rules more specifically than does either Story or Marshall. He sets them out in full to prove his first point—that a corporate charter is a contract. He then draws a distinction between public and private corporations, holding that the former are subject to legislative control whereas the latter are not. A college he finds to be a private eleemosynary corporation.

Washington, apparently, did not find it necessary to refute the argument that Parliament could not have been obligated by its contract since it was legally omnipotent.

¹¹ 2 Blackstone's Coms., 37.

¹² 1 Coke's Institutes, 47.

Story does not place any particular emphasis upon the specific doctrines which Washington relied on. He begins by describing a corporation as an artificial person, existing in contemplation of law, etc., and then launches into a disquisition upon public and private corporations. He reviews the doctrines as to the visitatorial powers of the founders of eleemosynary corporations, reviews the College charter, and determines that it is a private eleemosynary corporation. He then states, page 683:

We are now led to the consideration of the first question in the cause, whether this charter is a contract within the clause of the constitution prohibiting any state from passing any law impairing the obligation of contracts,

and, after stating and explaining *Fletcher v. Peck*, says:

It determines in the most unequivocal manner, that the grant of a State is a contract within the clause of the constitution now in question, and that it implies a contract not to reassume the rights granted. *A fortiori*, the doctrine applies to a charter or grant from the king.

Continuing, he discusses at some length the question of consideration, then the question—which none of the other justices discussed—as to how a corporation could be a contracting party to the sovereign act which creates it. This he follows with an answer to the criticism that there could be no contract between the State and the trustees because the latter had no private beneficial interest in the property, a point which he treats from various aspects and at great length. After meeting the objection that the charter was dissolved by the Revolution, he finishes the opinion by examining the acts of New Hampshire in question and pointing out how they impaired the obligation of the contract contained in the original charter, and here he brings in several of the rules which Washington relied on, as, for example, that a new charter cannot be imposed on a corporation without its consent.

Chief Justice Marshall argues quite differently from either Story or Washington. He opens the argument with this assertion, page 627:

It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is found.

"Is this contract protected by the constitution of the United States?" he asks. "It is argued," he says, "that the clause was not intended to restrain the States from regulating their civil institutions." To this he is quite ready to agree. Therefore he says, pages 629, 630:

This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature may act according to its judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

As was his wont, Marshall cites practically no authorities. He examines the charter. It appears to be a private eleemosynary corporation. Do its objects stamp on it a different character? No; every schoolmaster is not a public officer. Nor does the source from which it derived its funds make it a public institution. Is it from the act of incorporation? This he likewise discusses on principle, until he asks the question: "Is it because its existence, its capacities, its powers, are given by law?" Because the government has given it power to take property may it interfere to direct how and for what purposes this property may be held? This he answers by asserting: "This principle has never been asserted or recognized, and is supported by no authority. Can it derive aid from reason?" He then enters into the question, which he thinks the most difficult, as to who has sufficient interest in the property of the College to give him a standing in court. In so doing he makes the following rather interesting remark, page 643, in regard to the omnipotent power of Parliament, he being the only justice who has anything to say upon the subject:

According to the theory of the British Constitution, their Parliament is omnipotent. To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid; but its power is not questioned. Had Parliament, immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet, then, as now, the donors would have had no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said, that the trustees, in whom the rights of all were combined, possessed no private, individual, beneficial interest in the property confided to their protection. Yet the contract would at that time have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed. In reason, in justice, and in law, it is now what it was in 1769.

He concludes this part of the argument by saying, page 643: "This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which real and personal estate has been conveyed to the corporation."

"It is more than possible," he admits, "that the preservation of rights of this description was not particularly in the view of the framers of the constitution." Being within the words of the Constitution, however, it must be within its operation likewise, "unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception." But he finds that public policy does not demand that these institutions remain subject to legislative supervision.

The charter was therefore a contract protected by the United States Constitution. New Hampshire succeeded to the obligations of the Crown. And here he again touches upon the omnipotent power of Parliament. He says, page 651:

By the revolution, the duties, as well as the powers of government devolved on the people of New Hampshire. It is admitted,

that among the latter was comprehended the transcendent power of parliament, as well as that of the executive department. It is too clear to require the support of argument, that all contracts and rights, respecting property, remain unchanged by the revolution. The obligations, then, which were created by the charter of Dartmouth College, were the same in the new that they had been in the old government. The power of the government was also the same. A repeal of this charter at any time prior to the adoption of the present constitution of the United States would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature to be found in the constitution of the State. But the constitution of the United States has imposed this additional limitation, that the legislature of a State shall pass no act impairing the obligation of contracts.

The opinion ends with a demonstration that the acts of New Hampshire impaired the obligation of the contract.

The foregoing is, of course, but a bare outline of the arguments, and can give only an inadequate idea of Story's painstaking and exhaustive citation of authorities and of the exquisitely polished and effective argument of Marshall.

Marshall argued upon principle, not upon authority, and, as such, the argument is a very powerful one. The property donated to this college should not belong, he feels, either in justice or upon the ground of public policy, to the state; it is private property. But to allow the legislature to dissolve the corporation at its pleasure would work a forfeiture of this property.

In spite of the force of this reasoning, it seems that the question, how did the common law and the constitutional practice of England regard corporations, has such a direct bearing upon the issue raised in this case, even though the existence and obligation of the contract was to be determined upon principles of natural law, that more attention should have been paid to this point and a fuller citation of authorities should have been given by the Chief Justice. Granted, however, that the common law regarded corporate franchises as private property, similar in kind to other property, his attitude towards the omnipotent power of Parliament seems, for the reasons already explained, properly taken.

We are brought back therefore to the question, how were corporations regarded at common law? And we would again call to mind the rules that the Crown could not alter or repeal a grant of corporate powers, and that such grants were called franchises, which were incorporeal hereditaments, which were a species of private property.

It is said, however, that these doctrines only demonstrate the existence of a contract between the grantees and the Crown, and not the existence of one between the grantees and Parliament. It is true, of course, that a contract obligatory upon the Crown only is proved; yet the fact that it was obligatory upon the Crown would suggest that it was not considered to be at the mercy of Parliament, and this is strengthened, as was said before, by the fact that franchises were spoken of as property. However, it is pointed out by Mr. Hill¹³ that the common law writers especially recognized the power of Parliament to dissolve corporations. Corporations, he says, were political institutions as their very name (body *politic* and corporate) shows.

Kyd and Blackstone did seem to consider it necessary to assert that corporations could be dissolved by an act of Parliament. If by this they meant merely that Parliament could dissolve a corporation by virtue of its omnipotence solely, it does not affect our argument. If, on the other hand, they meant that Parliament had a special supervisory power over corporations, it strongly negatives the contract theory. Blackstone's statement rather infers the one view, Kyd's the other. Blackstone says: "A corporation may be dissolved by act of Parliament, which is boundless in its operations."¹⁴ Kyd says, "That a corporation may be dissolved by act of Parliament is a consequence of the omnipotence of that body in all matters of political institution."¹⁵ Kyd, it may be said, is a writer who displays a good deal of originality, and many of whose theories, therefore, are at

¹³ 8 American Law Rev. 189.

¹⁴ 1 Blackstone, 485.

¹⁵ 2 Kyd, Corporations, p. 447.

variance with the accepted doctrines of that time. Thus he maintains that a corporation is not a mere invisible and intangible body existing only in contemplation of law, thus foreshadowing the newer theories on the subject, and also that it is not proper to speak of a charter as a franchise. The latter position was only adopted, however, upon the ground that a corporation was a person in itself, whereas a franchise was a transferable privilege existing only in the hands of some person—a corporation “is to a franchise as a substance to its attribute”—but, he says of the right of the members of the corporation to act in that capacity: “It is a right of such nature that every member, separately considered, has a free-hold in it, and all, jointly considered, have an inheritance which may go in succession. Natural persons, as such, are capable of taking and holding this right, which is not taken or held in their politic, but in their natural capacity.”¹⁶

Besides the arguments which we have thus far considered, much stress was laid, in all three opinions, upon the fact that the college was a private corporation. This implied an admission that public corporations were subject to governmental regulation and control, and a claim that private corporations were not. If such a broad distinction was recognized at common law, the case is certainly proved in favor of the sanctity of the corporate rights of all private corporations.

This argument, it may be noted, was not treated in exactly the same way in all of the opinions. Marshall, for instance, did not claim that this distinction was recognized at common law. He simply said that the Constitution never intended to prohibit the States from regulating their civil institutions. He further argued that the fact of incorporation was immaterial in determining whether an institution was or was not a public or civil one: “The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the

¹⁶ 1 Kyd, *Corporations*, p. 15.

objects for which they are created." In fact he did not use the words "public corporation," as distinguished from "private corporations," at all.

Story laid the greatest stress upon the distinction, and regarded it, apparently, as a well settled rule of the common law. We think, however, that he draws the distinction far more sharply than the authorities justified. The only real authority is the case of *Phillips v. Bury*,¹⁷ which we shall shortly consider.

Justice Washington seems to state the matter with eminent fairness. He quotes the language of Lord Holt in *Phillips v. Bury* practically verbatim. In the original case it is as follows:

And that we may the better apprehend the nature of a visitor, we are to consider that there are in law two sorts of corporations aggregate; such as are for public government, and such as are for private charity. Those that are for the public government of a town, city, nursery, or the like, being for public advantage, are to be governed according to the laws of the land; if they make any particular private laws and constitutions, the validity and justice of them is examinable in the king's courts; of these there are no particular private founders, and consequently no particular visitor. . . . But private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them; and, therefore, if there be no visitor appointed by the founder, the law appoints the founder and his heirs to be visitors, who are to proceed and act according to the particular laws and constitutions assigned them by the founder.

"This right of government and visitation," continues Justice Washington, "arises from the property which the founder had in the lands assigned to support the charity; and as he is the author of the charity, the law invests him with the necessary power of inspecting and regulating it. The authorities are full to prove that a college is a private charity, as well as a hospital, and that there is, in reality, no difference between them except in degree; but they are within the same reason, and both eleemosynary. These corporations, civil and eleemosynary, which differ from each other so especially in their nature and constitution, may very well differ in matters which concern their rights and

¹⁷ 2 T. R. 352.

privileges, and their existence and subjection to governmental control." He then endeavors to justify the distinction, but upon reason rather than upon authority.

It is noticeable that Washington is careful and conservative in his statement as to the doctrine of public and private corporations, and there was good reason for his being so. In the first place, the authority of *Phillips v. Bury* is conditioned by the question which was at issue in that case. There the court was dealing with the doctrine of the visitatorial power over corporations, and the question was whether the king's courts had jurisdiction to review the action of the visitor of a college who had deprived the rector of his office. Lord Holt held that they had no such power, and distinguished the case from that of public corporations, as to which the king's courts exercised a visitatorial power. He was far from saying, indeed could not have said, that the king could interfere in the government of these public corporations, nor did he say that Parliament was the proper body to supervise them. As Blackstone put it, the king was the founder of civil corporations, but his visitatorial power over them was only exercised through the king's courts. We agree, therefore, with Mr. Hill that *Phillips v. Bury* does not warrant the conclusion which Story drew from it, and that it does not of itself furnish authority for the general distinction taken by the court between public and private corporations. In the next place, as Mr. Hill points out, neither Hale,¹⁸ Kyd, Blackstone, Wooddeson, Chitty¹⁹ nor Stephen²⁰ draws any distinction between public and private corporations. The classification is always into aggregate and sole, ecclesiastical and law, civil and eleemosynary. Finally, it may be pointed out that the very case most relied upon to demonstrate the contractual relation between the Crown and its grantees, growing out of a grant of corporate powers,—the case of *The King v. Passmore*—involved the

¹⁸ Hale, *Analysis of the Law*.

¹⁹ Chitty on the *Prerogative*.

²⁰ Stephen's *Commentaries on the Laws of England*.

charter of a borough, and the language of Buller, J., heretofore quoted, was spoken of this charter. In fact, the doctrines that the Crown could not interfere with a charter once granted, and that charters were franchises, applied to borough charters as well as to the charters of other kinds of corporations.

This seems to put the reasoning of the court, at least of Story and Washington, in a rather difficult position. It was declared that public corporations had no contract rights in their franchises, but that private corporations did have. Yet the very precedents cited to prove that the charters of private corporations were regarded as private property apply equally to public corporations. To declare that all charters were irrepealable and unamendable by the legislature was an impossibility, in view of the established practise in this country giving the legislature full control over public or municipal corporations. To declare that all corporations were subject to legislative control would have necessitated an affirmance of the decision of the New Hampshire court.

It seems correct to say that the common law did not draw the clear distinction between private and public corporations which Story attributed to it; all corporations were treated as of the same genus and species. But as between the two conceptions of public institution and private property, it may fairly be said that corporations were placed in the latter class, as we have already shown in part and shall show more fully hereafter. The criticism of this distinction is, therefore, not of any particular importance.

There is one more authoritative source, to which we have not yet turned, and which, as we have already noted, is of especial importance, in a state whose legislature is legally omnipotent, in estimating the nature and sanctity of private rights, namely, the legislative usage in regard to these rights.

The actual precedents which we are about to review are not entirely clear. They lend themselves to conflicting interpretations. But although this is the case, it nevertheless suggests another consideration which should not be over-

looked. The question to which we are seeking an answer is: Were corporate franchises private property? In its last analysis this depends, in a state where the legislature is omnipotent, upon the way in which such franchises were generally regarded at the time they were granted, and Justice McKenna's observation, in his dissenting opinion in *Blair v. Chicago*,²¹ in which he was endeavoring to determine the true construction of a contract made by one of the States, that "whatever we may profess, it is not easy to realize the conditions, thoughts and purposes of another time," is peculiarly applicable to the case at hand. Marshall, Story and Washington were much closer to the thought and feeling of the common law of the eighteenth century than we are to-day, and there is a reasonably strong presumption that they interpreted its spirit correctly in this instance.

Judge Bartlett, in his very able argument before the Court of Appeals of New Hampshire, maintained that corporations had always been regarded as subject to regulation by Parliament, as was shown, he said, by actual precedents.²² Bartlett argues:

When the nation was dissatisfied with the operations of the land bank and south-sea scheme, no difficulty existed for want of power in parliament to take away their charters and even make the members individually liable for bills.²³ In the time of Henry Sixth a statute was passed by which all corporations and licenses granted by that prince were declared to be void.²⁴ Monopolies granted by charter are always abolished by parliament when thought proper.²⁵ So the fee for admission into trading companies is altered almost yearly by parliament, although much against the inclination of the corporators; as also the qualifications and number of members.—In the 23rd of Geo. II. a corporation was established for trade to Africa, with great detail in its rights, privileges, etc. and by statute the fort of Senegal with all its dependencies had been vested in it;

²¹ 201 U. S. 401 at 501.

²² This point, so far as appears from the printed report, was barely touched upon in the Supreme Court. The argument for the new trustees, which was made in that court by different counsel, was, it must be admitted, far inferior to the arguments presented for the same side in the court below.

²³ 5 Rus. Mod. Eu. 14.

²⁴ Bac. Abr. Stat. F. 18.

²⁵ 1 Tm. W. M. 181.

still in the 5th of Geo. III. parliament thought proper, on much deliberation and after much opposition, to take from their jurisdiction that fort and a large extent of coast, vest it in the crown and declare the trade thither free to all his majesty's subjects.—Indeed for proof that parliament have controuled, altered, and even abolished corporations at their pleasure, it cannot be necessary to refer to particular cases, while no book upon the subject can be found that does not recognize the principle.²⁶ But if examples of a college are necessary, among many others, that of Manchester college may be noticed, where parliament took from a special visitor the power of visitation and vested it in the crown by the 2d of Geo. II.²⁷ Also the case of *Rex & Reg. vs. St. John's College*, where by statute of 1 W. & M. for abrogating the oaths of allegiance and supremacy, it was provided that the office of head or fellow of a college in either university should be vacated if the incumbent refused the new oath.²⁸

In this country too our provincial assemblies exercised the same power and often changed the whole organization of such institutions.—An act was passed in Connecticut in 1723 without petition or consent of the corporation "For the more full and complete establishment of Yale College, and for enlarging its powers and privileges." By this act, the number of trustees was enlarged, new offices created, and new regulations made with regard to the number which should constitute a quorum.²⁹

By an order of the general court of the province of Massachusetts, 1673, an addition was made to the members of the corporation of Harvard College, against the will of the corporation.³⁰ In 1784, the charter of Trinity church in New York, with regard to induction was repealed by the legislature.³¹ To these might be added many other instances, (as 3 John. Rep. 127-151, &c.) But I will here leave the question as to the subjection of corporations to the general legislative power with an offer to abandon the defence when one unequivocal authority shall be produced by the plaintiffs to show that the exercise of such power by the legislature of Great Britain was ever adjudged illegal.³²

With the exception of the South Sea Company, the other "bubble" companies were not corporations at all. The Bubble Act passed by Parliament was for the suppression of all those pretending to act as a corporation; and the South Sea Company was especially excepted from its provisions.³³ The statute of Henry VI referred to is indeed mentioned in several reported cases, but an examination of

²⁶ 2 Term. Rep. 533—8 Term. Rep. 430—Doug. Rep. 637.

²⁷ 4 Term Rep. 236-237, 244; 2 Term Rep. 318.

²⁸ 4 Mod. Rep. 233.

²⁹ 2 Doug. Summary, 183.

³⁰ 1 Hutch. Hist. 159.

³¹ 9 Johns. Rep. 127.

³² 65 New Hampshire Rep. 573-574.

³³ Carr, the Law of Corporations, p. 108; Select Charters of Trading Companies, vol. xxviii, Selden Society Publications, p. cxxxi.

the statutes has failed to disclose it.²⁴ The act of 2 Henry VI, chap. 1, confirmed all existing franchises. The argument as to monopolies is not in point, the charter in question not being a monopoly. The case of the African Company seems to be a misleading citation. This company seemed to have no private right in the forts.²⁵

The case of Manchester College is not in point because the act of Parliament was in this case passed to avoid the difficulty of a vacancy in the office of rector caused by the disqualification of the incumbent. The oath referred to which was required of heads and fellows of colleges was merely a general oath of allegiance such as might have been required of every person. As to the precedent with regard

²⁴ The Statute is referred to in these cases as a private statute, and possibly for that reason it is not found in the Statutes of the Realm.

²⁵ The corporation which was divested of the forts was the successor of the Royal African Company of England, but it was a corporation of a very peculiar nature. The act of 25 George II, chap. xl, which repealed the charter of the Royal African Company, which had gotten into financial difficulties, recited that that company was willing to surrender its lands, forts, cannon, etc. and its charter, and appropriated about ninety thousand pounds towards paying the creditors of the company and about twenty-three thousand pounds as a payment to the owners of the stock. The new company was named The Company of Merchants Trading in Africa. It was a non-stock company. Any merchant trading in Africa could become a member by paying forty shillings. It could not trade in its corporate capacity. The managing committee of the company was subject to the supervision of the government commissioners for trade who could remove the committee members, and the committee had to submit annual accounts to the Exchequer and to Parliament. Finally the forts and settlements were given to the Company not for its own proper use and behoof, but "to the interest and purpose that said forts, settlements and premises shall be employed at all times hereafter, only for the protection, encouragement and defense of said trade." The repealing act of 5 George III, chap. xlv, recites this purpose and declares that it will be better fulfilled by vesting the forts in the Crown. The Royal African Company had been given an exclusive grant for a certain period. "When this period expired," says Mr. Carr, "the House resolved that the trade ought to be free, that forts and settlements ought to be enlarged and maintained by a charge borne out of the trade, that the plantations must be sufficiently supplied with negroes at reasonable rates, and that a large stock was necessary. The company protested its legal right in the forts under a grant from the Crown, and the threatened Bill did not pass." (Selden Society, Publications, vol. xviii, *Select Charters of Trading Companies*, Introduction, p. 48.) This shows the difference in nature between the two companies.

to Yale College, we have not examined the reference and are not able to comment, except to say that the college is not alleged to have opposed the amendment. A reference to Hutchinson's History of Massachusetts does not disclose that the amendment to the charter of Harvard College was made against the will of the corporation, nor does this element appear in regard to the amendment of the charter of Trinity Church.

Mr. Sullivan, arguing for the same side, gave the following instances of legislative interferences with chartered rights:

The legislatures of many of the states, perhaps of all of them, have taken from private corporations some of their rights and privileges, when the welfare of the community has required it. In this state it has often been done.—The New Hampshire Bank made some of its bills payable in Philadelphia. The General Court passed an act declaring that after a certain day "it should be unlawful for any Banking company in this state, by themselves, their directors or agents to issue any bank bill or bank note payable at any other place, than at the Bank from which it is issued."⁸⁶ Every Banking company that acted in violation of this law, was subjected to a penalty of one hundred dollars for each offence. The New Hampshire Bank had a right, by its charter, to make its bills payable in Philadelphia, or New York, or at any place whatever. The act prohibiting this, was an alteration of its charter, as much as if it had been entitled, an act to alter and amend the charter of the New Hampshire Bank. Yet it has never been suggested, that the legislature had not power, by the constitution, to pass the law. In many other instances, the General Court has deprived banks of rights conferred on them, and in effect, altered their charters. By an act passed in June, 1807,⁸⁷ Banks were forbidden to issue bills, which were not payable on demand and to bearer; or which were subject to any condition. Every Bank, existing in the state at the time when this law was passed, had a right by its charter to make its bills payable at a future day—to order—and subject to conditions. The law, depriving Banks of these rights, has never been considered as repugnant to the constitution. It has not unfrequently happened that the legislatures of those states, in which Banks have been established, have prohibited their passing bills under certain denominations. Thus, the General Court of Massachusetts in June, 1799, made a law, that no Bank, incorporated by the legislature of that Commonwealth, except the Nantucket Bank, should issue any notes for a less sum than five dollars.⁸⁸ By their charters they had a right to issue bills of any denomination. This law deprived them of that right.

The General Court have not only imposed new duties on Banks,

⁸⁶ State Laws, 283.

⁸⁷ Ibid.

⁸⁸ Mass. Laws, 884.

but have added heavy penalties, to enforce the performance of them. By an act, passed in June, 1814, the directors of the several Banks in this state are obliged to make returns of the situation of their respective Banks, annually, to the Governor and Council; and in case of neglect or refusal, the Banks are subjected to a penalty of one thousand dollars.

The General Court of Massachusetts passed a law, by which all the Banks within the Commonwealth were subjected to a penalty of two per cent. a month, on the amount of those of their bills, which should not be paid, when presented for payment. An action was commenced against the Penobscot Bank to recover the amount of certain bills, presented for payment, but which were not paid; and also to recover two per cent. a month on that amount. It was contended on the part of the Bank, that the law was unconstitutional. But the Court recognized the authority of the legislature to make it. It was, say the Court, "A duty incumbent on the legislature to pass the law, and this the rather, as these corporations derive all their powers from legislative grants."³⁹ In this case the Court recognizes the authority of the legislature, to superintend corporations of a private nature, and to impose penalties upon them for not performing those duties, the neglect of which produces mischief to society.—They hold, that as these corporations derive all their powers from legislative grants, it is not only the right, but the duty of the legislature to see that the Commonwealth receives no detriment.⁴⁰

Practically all of these acts were general acts regulating particular phases of the banking business, and none of them necessarily impaired any charter provision, nor is it at all likely that they did so. Again, if any of them did impair charter grants, it is not apparent that they were ever brought before and sustained by the courts.

Angell and Ames, in their treatise on private corporations, cite the case of the dissolution of the Knights Templars in the reign of Edward II. It appears from Kyd, however, that this body was incorporated by the Pope and had been dissolved by one of his successors some years before the act of 17 Edward II was passed judging that the Templars were well dissolved and conferring the property of the order upon the Knights of St. John.⁴¹

A precedent which cannot be evaded, however, is the case of the dissolution of the monasteries in the time of Henry VIII, and the subsequent confiscation of their property. The case was apparently considered a very excep-

³⁹ 8 Mass. Rep. 445.

⁴⁰ 56 New Hampshire Reports, pp. 506, 507, 508.

⁴¹ 2 Kyd, Corporations, p. 446.

tional one, and could hardly have been regarded as furnishing a precedent for ordinary times.⁴²

A second case of interference was the passage of the "Corporation Act" in the reign of Charles II. This act "enjoined all magistrates and persons bearing offices of trust in corporations to swear that they believed it unlawful, on any pretense whatever to take arms against the king, and that they abhorred the traitorous position of bearing arms by his authority against his person or against those that are commissioned by him. They were also to renounce all obligation arising out of the oath called the solemn league and covenant; in case of refusal to be immediately removed from office. Those elected in the future were, in addition to the same oaths, to have received the sacrament within one year before their election according to the rites of the English church."⁴³ Yet it is by no means apparent that these two cases of Parliamentary interference sufficed to estab-

⁴² Thus Hallam writes of the confiscation of the property of the monasteries: "A few more were afterwards extinguished through his (Woolsey's) instigation; and thus the prejudice against interference with this species of property was somewhat worn off, and men's minds gradually prepared for the sweeping confiscations of Cromwell. The king indeed was abundantly willing to replenish his exchequer by violent means, and to avenge himself on those who gainsayed his supremacy; but it was this able statesman who, prompted both by the natural appetite of ministers for the subject's money, and, as has been generally surmised, by a secret partiality towards the Reformation, devised and carried on with complete success, if not with the utmost produce, a measure of no inconsiderable hazard and difficulty. For such it surely was, under a system of government which rested so much on antiquity, and in spite of the peculiar sacredness which the English attach to all freehold property, to annihilate so many prescriptive baronial tenures, the possessors whereof composed more than a third part of the house of lords, and to subject so many estates which the law had rendered inalienable, to maxims of escheat and forfeiture that had never been help applicable to their tenure. But for this purpose it was necessary, by exposing the gross corruptions of monasteries, both to intimidate the regular clergy, and to excite popular indignation against them." Hallam, *Constitutional History of England*, vol. i, pp. 70-71.

⁴³ Hallam, *Constitutional History of England*, vol. ii, pp. 27-28. The object of the act was to oust the dissenters from the corporation and to place the royalists in control.

lish the doctrine that corporations had no private rights in their franchises.

There is a rather interesting passage to be found in Browne's Civil and Admiralty Law, published in 1802. Browne says: "Corporations were dissolved at Rome by the prince, by death, by surrender, by forfeiture. So with us, corporations may be dissolved by act of Parliament, whose power is said to know no limits, but is on them very sparingly and cautiously exercised."⁴⁴

Turning to a recent writer upon the origin and development of corporations, we find the author remarking that "the body of principles apparently necessary for the regulation of their relations have been attached to the main body of English Law by means of fictions." For this reason, he explains, the historian and jurist have always had difficulty in knowing how to treat them: "It has always been a question whether they were public or private in nature, or whether they were divisions of the state or associations of citizens—a matter of importance in technical analysis."⁴⁵ Further he says:

The maturity of the conception of corporations in the English Law was undoubtedly facilitated by the development of the corporations themselves. It was not entirely fortuitous that the conception of corporations as artificial persons was nearly coincidental with the completion of the process of "shrinkage" of corporations from entire communities to smaller select bodies within them. The close bodies in guilds and municipalities were crystallizing during the fourteenth and fifteenth centuries. It was when they ceased to derive their life from the communities themselves and appeared to enjoy an existence independent of them, not in harmony with them but rather in opposition and contrast to them, that their distinct personality emerged. Moreover, the development facilitated the substitution of the private for the public view that might be expected to be taken of the communities. The close bodies as well as the rest of the community regarded the powers reposed in them largely as sources of private advantage; the state was accordingly much more readily inclined to assign them to the department of private law than to that of public law. The nearer they approached the plane of private persons in their activity, the easier it was for the jurist's imagination to impute personality to them.⁴⁶

⁴⁴ Browne, Civil and Admiralty Law, p. 148.

⁴⁵ Davis, Origin and Development of Corporations, vol. ii, p. 239.

⁴⁶ Ibid., p. 294.

This, it may be observed, was spoken concerning the boroughs. The later history of the boroughs and the state of corruption into which they fell is well known. The borough franchise must indeed have appeared to be private property when it was possessed by a close, self-perpetuating body of men within the larger community which constituted the borough itself. The struggles of the boroughs against the attacks on their charters made by Charles II and James II must also have tended to intensify feeling of proprietorship among the possessors of the borough franchises.

There is perhaps another aspect of the borough franchises which affords better evidence of their proprietary nature. Even before the corporate idea was clearly formulated the boroughs possessed many franchises obtained chiefly by charters from the king. These franchises were the chief earmarks of the borough and they were largely political in their nature—the right to their own court, to the *firma burgi*, to be free from tolls, etc. But at the time of which we are speaking, society was based upon the feudal system. The land was full of franchises. Political and proprietary rights were everywhere commingled, but commingled in such a way that the proprietary side was by far the more conspicuous. These feudal privileges of the boroughs gave the king a good deal of control over them, yet even the king did not claim the right arbitrarily to despoil them of their privileges. And the king in those times was clothed to a much greater degree with the sovereign power of the state than he later became, when the power of Parliament expanded to his detriment.⁴⁷ After describing the various franchises of the boroughs, Pollock and Maitland continue: "Such in brief were the main franchises that the borough enjoyed, and these franchises, some or all of them, made the borough to be a borough. This gave the king a tight hold upon the townsfolk. The group of burgesses was a franchise-holder in a land full of franchise-holders, and had to submit to the rules which governed the other

⁴⁷ 1 Pollock v. Maitland's History of English Law, 2d ed., p. 668.

possessors of royal rights. It might lose its privileges by abuse or non-use; it might lose them by not claiming them before the justices in eyre, though in this case a moderate fine would procure their restoration."

Tracing the development of the corporate idea, Pollock and Maitland note the change of the boroughs into something bearing the resemblance of a gild—the phase of development upon which Mr. Davis laid stress in the passage we have quoted above. It is interesting to note one of the causes which these writers give for this change. "In the great boroughs," they say, "large sums of money were subscribed in order that privileges might be bought from the king, and the subscribing townsfolk naturally conceived that they purchased those privileges for themselves. Some definition of the privileged, the franchised, body was necessary, and yet in the great boroughs that body could not assume any of the old accustomed forms."⁴⁸

It would seem that it was this feeling of the proprietary nature of the borough franchises which preserved the boroughs untouched until long after their usefulness had ceased and, indeed, until long after their corruption was a matter of general recognition, for it was not until 1835, sixteen years after the decision in the Dartmouth College case, that their reform was actually accomplished.

There are some who have commented upon the College case who have used the argument that the court decided the controversy upon musty old English precedents rather than upon the liberal principles which inspired the common law upon its transplantation to this country. They claim that the existence of special privileges of any kind was contrary to the genius of our laws. In so arguing they admit, of course, the correctness of the decision, judged by English precedents. Judge Corwain, of the Supreme Court of Ohio, in an opinion delivered in the well known case of *Knoup v. Piqua Bank*,⁴⁹ takes this position, and in so doing

⁴⁸ *Ibid.*, p. 670.

⁴⁹ Decided in 1850; 1 Ohio St. 603, 616.

calls attention to the proprietary nature in which offices were long regarded in England. He says:

It is plain that many things are the subject of a franchise, in England, which are not such in this country. The best illustration of this perhaps, will appear by comparing the nature of an office in England, and an office in America. An office, like a franchise, is a royal gift. It is considered property, in England. Some offices are estates in fee simple, or fee tail; some estates for life, and some only estates at will. Cruise's Digest, Volume iii, Title 25. There are some offices, also, which are said to be estates for a term of years, or for one year. And ministerial offices may be in reversion, or to commence at a future period. Some offices are even assignable by deed. But, in America, an officer is only a public agent or trustee, and has no proprietorship, or right of property, in his office.

Another important authority which has been a good deal cited—it is one upon which Mr. Hill, in the article heretofore referred to, lays much stress—is the argument which Edmund Burke made in the year 1783 upon Mr. Fox's bill to repeal the charter of the East India Company. The bill was not passed and the charter therefore was not repealed, and so was in full force at the time the College case was decided. Mr. Hill contends, however, that the failure of this bill to pass was not in the least due to the respect entertained for the chartered rights of the company, and he maintains that the argument of Burke correctly represents the position of corporations at that time. Mr. Hill's quotation is a long one, but it necessitates our making a still longer one, for the reason that it seems that there is a qualifying and underlying conservatism in this argument of Burke's which Mr. Hill does not see, and which the portions which we have added serve to emphasize.

Webster, in his argument before the Supreme Court, had differentiated the case of the East India Company upon the grounds that it had been granted the widest sort of political dominion and that it had grossly abused its privileges, and these distinctions were evidently suggested by Burke's speech.

Burke argued as follows: "As to the first of these objections; I must observe that the phrase of the chartered rights of men is full of affectation; and very unusual in the dis-

cussion of privileges conferred by charters of the present description. But it is not difficult to discover what end that ambiguous mode of expression so often reiterated is meant to answer." He proceeds then to speak of the natural rights of man. These are indeed sacred things. If they are further affirmed and declared by express covenants, they are in a still better condition; "they partake not only of the sanctity of the object so secured, but of that public faith itself which secures an object of such importance." And here he refers to Magna Charta and similar documents. "These charters," he continues, "have made the very name of the charter dear to every Englishman. But, sir, there may be, and there are charters, not only different in their nature, but formed on principles the *very reverse* of those of the great charter. Of this kind is the charter of the East India Company. Magna charta is a charter to restrain power, and to destroy monopoly: the East India charter is a charter to establish monopoly and to create power. Political power and commercial monopoly are not the rights of man; and the rights to them derived from charters, it is fallacious and sophistical to call the chartered rights of men. These chartered rights (to speak of such charters and their effects in terms of the greatest possible moderation) do at least suspend the natural rights of mankind at large; and in their very frame and constitution are liable to fall into a direct violation of them."

It is a charter of the latter description (that is to say a charter of power and monopoly) which is affected by the bill before you. The bill, Sir, does, without question, affect it; it does affect it essentially and substantially. But having stated to you of what description the chartered rights are which this bill touches, I feel no difficulty at all in acknowledging the existence of those chartered rights in their fullest extent. They belong to the company in the surest manner, and they are secured to that body by every sort of public sanction. They are stamped by the faith of the king; they are stamped by the faith of parliament; they have been bought for money; for money honestly and fairly paid; they have been bought for valuable consideration, over and over again.

I therefore freely admit to the East India Company their claim to exclude their fellow subjects from the commerce of half the globe. I admit their claim to administer an annual territorial reve-

nue of seven millions sterling; to command an army of sixty thousand men; and to dispose (under the control of a sovereign, imperial discretion, and with the due observance of the natural and local law) of the lives and fortunes of thirty millions of their fellow creatures. All this they possess by charter, and by acts of parliament (in my opinion) without a shadow of controversy.

Those who carry the rights and claims of the company the furthest, do not contend for more than this; and all this I freely grant. But granting all this, they must grant to me, in my turn, that all political power which is set over men, and that all privilege claimed or exercised in exclusion of them, being wholly artificial, and for so much a derogation from the national equality of mankind at large, ought to be some way or other exercised ultimately for their benefit.

If this be true with regard to every species of political dominion, and every species of commercial privilege, none of which can be original, self-derived rights, or grants for the mere private benefits of the holders, then such rights, or privileges, or whatever else you choose to call them, are all in the strictest sense a trust; and it is of the very essence of every trust to be rendered accountable, and even totally to cease, when it substantially varies from the purposes for which alone it could have a lawful existence.

This, I conceive, sir, to be true of trusts of power vested in the highest hands, and of such as seem to hold of no human creature. But about the application of this principle to subordinate, derivative trusts, I do not see how a controversy can be maintained. To whom then would I make the East India Company accountable? Why to parliament, to be sure, to parliament from which their trust was derived, to parliament, which alone is capable of comprehending the magnitude of its object, and its abuse, and alone capable of an effective remedy. The very charter which is held out to exclude parliament from correcting malversation with regard to the high trust vested in the company is the very thing which at once gives a title and imposes a duty on us to interfere with effect wherever power and authority originating from ourselves are perverted from their purposes, and become instruments of wrong and violence. That the power notoriously, grossly abused has been bought from us is very certain. But this circumstance, which is urged against the bill, becomes an additional motive for our interference; lest we should be thought to have sold the blood of millions of men for the base consideration of money; we sold, I admit, all that we had to sell, that is, our authority, not our control. We had not a right to make a market of our duties.

I ground myself therefore on this principle—that if the abuse is proved, the contract is broken; and we reënter into all our rights; that is, into the exercise of all our duties.

Again he says:

The strong admission I have made of the company's rights (I am conscious of it) binds me to do a great deal. I do not presume to condemn those who argue *a priori*, against the propriety of leaving such extensive political powers in the hands of a company of merchants. I know much is, and much more may be, said against such a system. But with my particular ideas and sentiments, I cannot go that way to work. I feel an insuperable reluctance in giving my

hand to destroy any established institution of government, upon a theory, however plausible it may be. . . . To justify us in taking the administration of their affairs out of the hands of the East India Company, on my principles, I must see several conditions. 1st, The object affected by the abuse should be great and important. 2nd, The abuse affecting this great object ought to be a great abuse. 3rd, It ought to be habitual and not accidental. 4th, It ought to be utterly incurable in the body as it now stands constituted. All this ought to be made as visible to me as the light of the sun before I should strike off an atom of their charter.⁵⁰

It thus seems that Burke was far from asserting that the chartered rights of the company were held at the good pleasure of Parliament. When he says: "I ground myself on this principle—that if the abuse is proved, the contract is broken," he admits very plainly the existence of a contract between Parliament and the company. If it is contended that this contract cannot, under his theory, be a contract upon the principles of municipal law, it nevertheless completely meets the requirements for a contract upon the principles of natural law. Upon his theory, it is true, Parliament, contrary to the rule laid down for the Crown, would have the right to repeal its grants when they were abused without having to appeal to the courts to enforce a forfeiture. Such a doctrine was not, however, incompatible with the existence of a contract upon principles of natural law. Moreover it could not, of course, have been argued that Parliament would have to obtain the sanction of the courts before exercising its rights. At all events, Burke seems to recognize enough of a contract to warrant applying the prohibition of the "contracts clause" to it.⁵¹

⁵⁰ Burke's Works (Boston, 1826), vol. ii, p. 266 ff.

⁵¹ We might note that, although the generally accepted doctrine in this country seems to be that a State must apply to the courts to have a forfeiture of chartered franchises enforced, it is difficult to see why a legislative act repealing misused or non-used franchises should be denied effect by the courts, if the fact of misuser or non-user be shown; that is, it is difficult to see why the state should be compelled to go through the proceeding of judicially declaring a forfeiture, if a cause for forfeiture actually exists. In the case of *Given v. Wright*, 117 U. S. 648, the court said that they could see no reason why the government could not take the benefit of the presumption of the surrender of a franchise by its non-user for a period of say thirty years without taking judicial proceedings for forfeiting the same. The preponderance of the evidence seems to us to be

But we have not entirely exhausted the authorities which the court had, or might have had, to rely upon, and we wish to complete the list in order to show just what was the strength of the court's position.

In 1785 James Wilson published an argument, which he had made as counsel, in opposition to the repeal by the legislature of Pennsylvania of the charter which a prior legislature had granted to the Bank of North America. Although we have already quoted the argument at length, it sets out so clearly and at such an early day the doctrine that a charter was a contract that it seems worth while to quote again some of the pertinent language. After remarking that generally speaking a state must have the power to repeal its own laws, he says:

Very different is the case with regard to a law by which the state grants privileges to a congregation or other society. Here two parties are established, and two distinct interests subsist. Rules of justice, of faith, and of honor must, therefore, be established between them: for if interest alone is to be viewed, the congregation or society must always be at the mercy of the community. . . . For these reasons, whenever the objects and makers of a instrument, passed under the form of a law, are not the same, it is to be considered as a compact and interpreted according to the rules and maxims by which compacts are governed.⁵³

And James Wilson, the reputed author of the "contracts clause," was considered one of the most learned members of the Constitutional Convention, and was later a member of the Supreme Court of the United States.

Again, in an early Massachusetts case, the following statement was made by Chief Justice Parsons: "We are also satisfied that the rights legally vested in this, or in any

very strongly in favor of the view that the common law regarded corporate franchises as private property rights. And therefore we think it may fairly be said that a charter involved a contract not to repeal it, both upon common law principles and upon natural law principles. And if the common law, or the constitutional practice of the period under discussion, did distinguish between public and private corporations, and between the security with which they held their privileges, we think it safe to say that the age which Dicey calls that of "Blackstonian optimism" and "Eldonian toryism" would not have repudiated the doctrines as to private corporations which Marshall, Story and Washington attributed to it.

⁵³ Wilson's Works, ed. Adrews, p. 565.

corporation, cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation."⁵³

In the case of *Terrett v. Taylor*,⁵⁴ decided in 1815, Justice Story delivered an opinion in which he said that the state legislatures had no authority to repeal the charters of private corporations, although the same could not be said of public corporations. The facts of the case are peculiarly complicated, and we shall therefore not examine them here. It will suffice to say that it is a very close question whether the remarks of Story concerning the power of the legislature over corporate charters were or were not *obiter*, but the probabilities are that they were not. The case came up from the District of Columbia and involved the question of the effects of certain acts of the legislature of Virginia. Story, therefore, was not confined to the "contracts clause" as the sole basis for the decision. Story said:

How far the statute of 1786, ch. 12, repealing the statute of 1784, ch. 88, incorporating the episcopal churches, and the subsequent statutes in furtherance thereof of 1788, ch. 47, and ch. 53, were consistent with the principles of civil right or the constitution of Virginia, is a subject of much delicacy, and perhaps not without difficulty. It is observable, however, that they reserve to the churches all their corporate property, and authorize the appointment of trustees to manage the same. A *private* corporation created by the legislature may lose its franchise by a *misuser* or a *nonuser* of them; and they may be assumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture.—This is the common law of the land and is a tacit condition annexed to the creation of every such corporation. Upon a change of government, too, it may be admitted that such exclusive privileges attached to a private corporation as are inconsistent with the new government may be abolished. In respect, also, to *public* corporations, which exist only for public purposes, such as counties, towns, cities, etc., the legislature may, under proper limitations, have a right to change, modify, enlarge or restrain them, securing, however, the property for the uses of those for whom and at whose expense it was originally purchased. But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural jus-

⁵³ *Wales v. Stetson*, 2 Mass. 134 at 156. 1806.

⁵⁴ 9 Cranch, 43.

tice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals in resisting such a doctrine.⁵⁵

Finally, it may be noticed that the Court of Appeals of New Hampshire, in deciding in favor of the new trustees, rested their holding solely upon the ground that colleges were public corporations, and admitted that the charter of a private corporation was inviolable. Again, the counsel for the new trustees, in their arguments before the New Hampshire court, laid far more stress upon the point that the corporation was a public one than upon the point that all corporations were subject to governmental control, and in the Supreme Court, counsel for the new trustees relied exclusively upon the former argument.⁵⁶

There remains, therefore, to be considered the grounds upon which it has been contended that Dartmouth College should have been classed as a public corporation. The argument of the Supreme Court of New Hampshire upon this point is based almost entirely upon the proposition that the trustees of the college had no private interest which they could assert—surely a most narrow and technical method of reasoning. But the underlying idea of the opinion rather clearly appears to be that when property has been given to found institutions such as colleges and hospitals, the donors loose all private interest in the property, which becomes subject to the legal control of the state. Although disclaiming that they base their decision in the slightest degree upon expediency, the court devote the last two pages of the opinion to a justification of their position from the standpoint of public policy. And, indeed, the argument is very forci-

⁵⁵ 9 Cranch, 51-52.

⁵⁶ The New Hampshire court said: "It becomes, then, unnecessary to decide in this case, how far the legislature possesses a constitutional right to interfere in the concerns of private corporations. It may not, however, be improper to remark, that it would be difficult to find a satisfactory reason why the property and immunities of such corporations should not stand, in this respect, on the same ground with the property and immunities of individuals." See 65 N. H. Reps. 631.

bly put, and in a style which Marshall himself could hardly have improved upon.

But the court had no precedents to cite upon the point that the trustees had no rights which they could assert in a court of law. After all, that really depended upon the question whether any one had a beneficial interest in the property which they could have asserted, for, if there was any such beneficiary, surely the trustees could have asserted his rights for him.

On this larger question, also, we think it rather clear that the spirit of the common law was more truly interpreted by the Supreme Court of the United States than by that of the State. The state court's abstract reasoning to the effect that property given for these public purposes becomes essentially public property strikes one with some force in these times, but the court failed to cite any authorities to sustain its contention. Although the common law did distinguish between public and private charities, basing the distinction upon the inclusiveness or exclusiveness of the designation of the *cestuis qui trust*, it continually spoke, as we have seen from *Phillips v. Bury*, and as appears from other cases, of colleges and hospitals as private eleemosynary corporations, and the whole law as to founders and their visitatorial power is strong evidence that these corporations, whatever others may have been, were regarded as private in their nature. Then again, as Chief Justice Doe of New Hampshire has pointed out, this doctrine would have to be applied to all charitable trusts, whether they are incorporated or not; and yet it has never been supposed that the legislature could appoint trustees of its own to administer charitable trusts or associate them with existing trustees, nor have our legislatures ever undertaken the administration of charitable trusts. This has always been left to the judiciary.⁵⁷

It is arguable that public educational institutions do essentially belong to the public and should be subject to public control, and the opinion of the New Hampshire court is an

⁵⁷ Harv. Law Rev. 169-170.

excellent example of such an argument; but nothing is plainer than that this conception has not yet been accepted by the law of this country.

The contention has been made that Dartmouth College was essentially a university, and that universities, as distinct from colleges, were public corporations. Oxford and Cambridge, it is true, were regarded as somewhat different in their nature from the colleges of which they were composed. They were civil corporations, whereas the colleges were eleemosynary. They enjoyed certain political powers, including the right to representation in Parliament, but as has been seen, even they can not be regarded as public corporations at common law. Also, it would hardly have been proper to class Dartmouth College as a university merely because it had been given the power of awarding degrees. It had none of the other powers of universities. The clauses in its charter giving its officers the same powers as similar officers in the universities of England can hardly afford the foundation for any inferences as to its character as a university when it was distinctly designated in the charter as a college. This argument is not considered by any of the justices of the Supreme Court in their opinions.

We have endeavored to show, in the first part of this chapter, that, by the weight of authority then existing, the ruling of *Fletcher v. Peck* that a grant was a contract involving an obligation was a proper ruling. We have endeavored to show, in the second part of the chapter, that the ruling of *Fletcher v. Peck* that a state was bound by its grants, was also consonant with the generally accepted doctrines of that day. We believe that these conclusions are fairly supported by the evidence, but, in any event, these rulings, whose validity we have been discussing, had been fixed in our law by *Fletcher v. Peck* and were hence established principles by the time that *Dartmouth College v. Woodward* came up for decision. If grants by a state were contracts, all that needed to be done in the College case, as Story pointed out, was to find out whether a charter was

considered as granting a private, property right. We have just seen that there was a preponderating weight of authority to support the affirmative of this proposition.

There was also the matter of the omnipotent power of Parliament to be considered. It would not seem that the mere existence of an omnipotent power should have or did bother the counsel for the college. It was given almost no discussion in either court. Parliamentary omnipotence could repeal a land grant or confiscate a man's property, yet these proceedings would have been condemned as unlawful and unconstitutional. But the question as to what extent this Parliamentary omnipotence actually was used in the case of corporations did have a very important bearing upon the nature of corporate franchises, that is, whether they were private property. The second question therefore tends to merge itself into the first. All of which we have set out more fully above.

We do not in the least consider that the case should have been regarded by the counsel for the College as one which they were sure to win. While we say that the preponderance of authority was in their favor, we think that this fact would not militate against a feeling on the part of counsel for the College of doubt as to the outcome, and a desire on their part to bring as many questions as possible before the Supreme Court. There are few new questions of law, coming up to be decided for the first time, in which, if there is a possibility of two views being taken, counsel are not justified in being doubtful as to the outcome, and especially if the case, like the present one, wears somewhat of a political aspect.

Mr. Shirley, in his book entitled the *Dartmouth College Causes*, has come to conclusions somewhat at variance with those which we have reached. We wish, therefore, to consider a few of his principal conclusions and the arguments by which they are supported.⁵⁸ Mr. Shirley's argument is

⁵⁸ Mr. Shirley's book is very diffuse. It is argumentative almost from cover to cover. A number of facts, statements and cases are

well summarized in Lodge's *Life of Daniel Webster*, from which we shall quote. Lodge's conclusions and criticisms on the case may be found in the following passages:

It now becomes necessary to state briefly the points at issue in this case, which were all fully argued by the counsel on both sides. Mr. Mason's brief, which really covered the whole case, was that the acts of the Legislature were not obligatory, 1, because they were not within the general scope of legislative power; 2, because they violated certain provisions of the Constitution of New Hampshire restraining legislative power; 3, because they violated the Constitution of the United States. In Farrar's report of Mason's speech, twenty-three pages are devoted to the first point, eight to the second, and six to the third. In other words, the third point, involving the great constitutional doctrine on which the case was finally decided at Washington, the doctrine that the Legislature, by its acts, had impaired the obligation of a contract, was passed over lightly. In so doing, Mr. Mason was not alone. Neither he nor Judge Smith nor Mr. Webster nor the court nor the counsel on the other side, attached much importance to this point. Curiously enough, the theory had been originated many years before, by Wheelock himself, at a time when he expected that the minority of the trustees would invoke the aid of the Legislature against him, and his idea had been remembered. It was revived at the time of the newspaper controversy, and was pressed upon the attention of the trustees and upon that of their counsel. But the lawyers attached little weight to the suggestion, although they introduced it and argued it briefly. Mason, Smith, and Webster all relied for success on the ground covered by the first point in Mason's brief. This is called by Mr. Shirley the "Parsons view," from the fact that it was largely drawn from an argument made by Chief Justice Parsons in regard to visitatorial powers at Harvard College. Briefly stated, the argument was that the college was an institution founded by private persons for particular uses; that the charter was given to perpetuate such uses; that misconduct of the trustees was a question for the courts and that the Legislature, by its interference, transcended its powers. To these general principles, strengthened by particular clauses in the Constitution of New Hampshire, the counsel for the college trusted for victory. The theory of impairing the obligation of contracts they introduced, but they did not insist on it, or hope for much from it. On this point, however, and, of course, on this alone, the case went up to the Supreme Court. In December, 1817, Mr. Webster wrote to Mr. Mason, regretting that the case went up on "one point only." He occupied himself at this time in devising cases which should raise what he considered the really vital points, and which, coming within the jurisdiction of the United States, could be taken to the Circuit Court, and thence to the Supreme Court at Washington. These cases, in accordance with his suggestion, were begun, but before they came on in the Circuit Court, Mr. Webster made his

seized upon to support the argument and a number of inferences are drawn which have seemed to the writer, from a general—not a minute—reading of the book to be erroneously drawn, but a careful criticism of the whole work will not be attempted.

great effort at Washington. Three quarters of his legal arguments were there devoted to the points in the Circuit Court cases, which were not in any way before the Supreme Court in the *College vs. Woodward*. So little, indeed, did Mr. Webster think of the great constitutional question which has made the case famous, that he forced the other points in where he admitted that they had no proper standing, and argued them at length. They were touched upon by Marshall, who, however, decided wholly upon the constitutional question, and they were all thrown aside by Judge Washington, who declared them irrelevant, and rested his decision solely and properly on the constitutional point. Two months after his Washington argument, Mr. Webster, still urging forward the Circuit Court cases, wrote to Mr. Mason that all the questions must be brought properly before the Supreme Court, and that, on the "general principle" that the State Legislature could not divest rights, strengthened by the constitutional provisions of New Hampshire, he was sure they could defeat their adversaries. Thus this doctrine of "impairing the obligation of contracts," which produced a decision in its effects more far-reaching and of more general interest than perhaps any other ever made in this country, was imported into the case at the suggestion of laymen, was little esteemed by counsel, and was comparatively neglected in every argument.⁵⁹

The popular opinion of this case seems to be that Mr. Webster, with the aid of Mr. Mason and Judge Smith, developed a great constitutional argument, which he forced upon the acceptance of the court by the power of his close and logical reasoning, and thus established an interpretation of the Constitution of vast moment. The truth is, that the suggestion of the constitutional point, not a very remarkable idea in itself, originated, as has been said, with a layman, was regarded by Mr. Webster as a forlorn hope, and was very briefly discussed by him before the Supreme Court. He knew of course, that if the case were to be decided against *Woodward*, it could only be on the constitutional point, but he evidently thought that the court would not take the view of it which was favorable to the college.⁶⁰

Mr. Lodge speaks of the legal argument made by Webster as strong, effective and lucid, but dry, cold and lawyerlike. He continues:

It gives no conception of the glowing vehemence of the delivery, or of those omitted portions of the speech which dealt with matters outside the domain of law, and which were introduced by Mr. Webster with such telling and important results. He spoke for five hours, but in the printed report his speech occupies only three pages more than that of Mr. Mason in the court below. Both were slow speakers, and thus there is a great difference in time to be accounted for, even after making every allowance for the peroration which we have from another source, and for the wealth of legal and historical illustration with which Mr. Webster amplified his presentation of the question. "Something was left out," Mr. Webster says, and that something which must have occupied in its delivery nearly an hour

⁵⁹ Lodge, *Life of Webster*, pp. 80-82.

⁶⁰ *Ibid.*, pp. 97-98.

was the most conspicuous example of the generalship by which Mr. Webster achieved victory, and which was wholly apart from his law. This art of management had already been displayed in the treatment of the cases made up for the Circuit Courts, and in the elaborate and irrelevant legal discussion which Mr. Webster introduced before the Supreme Court. But this management now entered on a much higher stage, where it was destined to win victory, and exhibited in a high degree tact and knowledge of men. Mr. Webster was fully aware that he could rely, in any aspect of the case, upon the sympathy of Marshall and Washington. He was equally certain of the unyielding opposition of Duvall and Todd; the other three judges, Johnson, Livingston, and Story, were known to be adverse to the college, but were possible converts. The first point was to increase the sympathy of the Chief Justice to an eager and even passionate support. Mr. Webster knew the chord to strike, and he touched it with a master hand. This was the "something left out," of which we know the general drift, and we can easily imagine the effect. In the midst of all the legal and constitutional arguments, relevant and irrelevant, even in the pathetic appeal which he used so well in behalf of his Alma Mater, Mr. Webster boldly and yet skillfully introduced the political view of the case. So delicately did he do it that an attentive listener did not realize that he was straying from the field of "mere reason" into that of political passion. Here no man could equal him or help him, for here his eloquence had full scope, and on this he relied to arouse Marshall, whom he thoroughly understood. In occasional sentences he pictured his beloved college under the wise rule of Federalists and of the Church. He depicted the party assault that was made upon her. He showed the citadel of learning threatened with unholy invasion and falling helplessly into the hands of Jacobins and free-thinkers. As the tide of his resistless and solemn eloquence, mingled with his masterly argument, flowed on, we can imagine how the great Chief Justice roused like an old war-horse at the sound of the trumpet. The words of the speaker carried him back to the early years of the century when, in the full flush of manhood, at the head of his court, the last stronghold of Federalism, the last bulwark of sound government, he had faced the power of the triumphant Democrats. Once more it was Marshall against Jefferson,—the judge against the President. Then he had preserved the ark of the Constitution. Then he had seen the angry waves of popular feeling breaking vainly at his feet. Now, in his old age, the conflict was revived. Jacobinism was raising its sacrilegious hand against the temples of learning, against the friends of order and good government. The joy of battle must have glowed once more in the old man's breast as he grasped anew his weapons and prepared with all the force of his indomitable will to raise yet another constitutional barrier across the path of his ancient enemies.

We cannot but feel that Mr. Webster's lost passages, embodying this political appeal, did the work, and that the result was settled when the political passions of the Chief Justice were fairly aroused. Marshall would probably have brought about the decision by the sole force of his imperious will. But Mr. Webster did a good deal of effective work after the arguments were all finished, and no account of the case would be complete, without a glance at the famous peroration with which he concluded his speech and in which he

boldly flung aside all vestige of legal reasoning, and spoke directly to the passions and emotions of his hearers.⁶¹

Mr. Lodge describes in the following manner the efforts which were made after the case was argued to create public sentiment in favor of the College:

This work was pushed with increased eagerness after the argument at Washington, and the object now was to create about the three doubtful judges an atmosphere of public opinion which should imperceptibly bring them over to the college. Johnson, Livingston, and Story were all men who would have started at the barest suspicion of outside influence even in the most legitimate form of argument, which was all that was ever thought of or attempted. This made the task of the trustees very delicate and difficult in developing a public sentiment which should sway the judges without their being aware of it. The printed arguments of Mason, Smith, and Webster were carefully sent to certain of the judges, but not to all. All documents of a similar character found their way to the same quarters. The leading Federalists were aroused everywhere, so that the judges might be made to feel their opinion. With Story, as a New England man, a Democrat by circumstances, a Federalist by nature, there was but little difficulty. A thorough review of the case, joined with Mr. Webster's argument, caused him soon to change his first impression. To reach Livingston and Johnson was not so easy, for they were out of New England, and it was necessary to go a long way round to get at them. The great legal upholder of Federalism in New York was Chancellor Kent. His first impression, like that of Story, was decidedly against the college, but after much effort on the part of the trustees and their able allies, Kent was converted partly through his reason, partly through his Federalism, and then his powers of persuasion and his great influence on opinion came to bear very directly on Livingston, more remotely on Johnson. The whole business was managed like a quiet, decorous political campaign.⁶²

The statement thus made as to the weakness of the case of the College in the opinion of its counsel seems greatly exaggerated. In the first place, the argument made by computing the number of pages devoted by counsel in their arguments to the consideration of the "contracts clause," and then concluding that the rest of the arguments of counsel were irrelevant is utterly worthless. As we have shown, a charter could only be established as a contract under the "contracts clause" by showing that it was regarded at common law as a grant of a private property right. The three headings of Mason's argument, which

⁶¹ Ibid., pp. 86-88.

⁶² Ibid., pp. 92-93.

Webster also used, were mere frames on which to set the discussion of the nature of the corporate franchise as a piece of property. Had Webster omitted the first two headings and retained only the heading that the acts in question impaired the obligation of a contract, only about six pages, in which he considers in detail specific clauses of the New Hampshire constitution, of his whole forty-nine page argument would have become irrelevant. The rest would not only have been relevant, it would have been absolutely essential. The inference based upon the page calculation is, therefore, unfounded.

Answering another of the points made, we would say that we have not discovered that Webster ever stated that he regarded the case as a "forlorn hope." That seems to be an inference of Mr. Shirley. The expressions found in Webster's correspondence simply amount to saying that he is sorry the case went up on a single point and would like to bring a case in the federal courts so as to bring the whole case before the Supreme Court.⁶⁸

⁶⁸ The following are the quotations which Mr. Shirley gives from Webster's correspondence.

"You are aware that in the college cause the only question that can be argued at Washington is whether the recent acts of the Legislature of New Hampshire do not violate the Constitution of the United States. This point, though we trust a strong one, is not perhaps stronger than that derived from the character of these acts compared with the Constitution of New Hampshire. It has occurred to me whether it would not be well to bring an action which should present both and all our points to the Supreme Court . . ."

"It is our misfortune that our cause goes to Washington on a single point. I wish we had it in such shape as to raise all the other objections as well as the repugnancy of these acts to the Constitution of the United States."

"I am sorry our college cause goes to Washington on one point only. What do you think of an action in some court of the United States that shall raise all the objections to the act in question?"

"I am glad a suit is to be brought [in the federal courts]."

"The question which we must raise in one of these actions, is whether by the general principles of our governments the State Legislatures be not restrained from divesting vested rights. This, of course, independently of the constitutional provision respecting contracts. On this question I have great confidence in a decision on the right side. This is the proposition with which you began your argument at Exeter and which I endeavored to state from your minutes at Washington." Shirley, pp. 5, 6.

The fact that the Justices of the Supreme Court were unable to reach a conclusion the day after the case was argued is sometimes referred to as warranting the inference that a number of the Justices were at that time unfavorable to the College, and had to be brought around to another way of thinking, either by outside influence or by the force of the Chief Justice's will, but the inference seems rather extreme. The principal source of information as to the position of the Justices upon the case at that time is found in Webster's letter to Smith, of March 18, 1818. It will be noticed that the statement is not by any means as positive as Mr. Lodge's statement upon the same subject. Webster wrote:

I have no accurate knowledge of the manner in which the judges are divided. The chief and Washington, I have no doubt, are with us. Duval and Todd are perhaps against us; the other three holding up. I cannot much doubt but that Story will be with us in the end, and I think we have much more than an even chance with one of the others.⁶⁴

Again, much is made of the conversions of Story and Kent, who had originally held opinions in favor of the new trustees. We do not marvel at Story's conversion, but we are surprised at the fact of his ever having held another view, considering the position which he had taken four years before, in the case of *Terrett v. Taylor*, in regard to the sanctity of corporate franchises.

Kent offers a very reasonable explanation of his change of opinion. In a letter to Mr. Marsh, he writes that he took a trip through New Hampshire to recruit his spirits, stopped off at Hanover where he met a friend who introduced him to the president and professors of the university, but did not meet the officers of the college:

Being on the spot and witnessing the college sessions I was anxious to know something of the controversy, though nothing was

⁶⁴ Mr. Shirley gives the following account from *The National Intelligencer*: "On Friday morning [March 13, 1818] the chief justice observed that the judges conferred on the cause between the Trustees of Dartmouth College and William H. Woodward. Some of the judges have not come to an opinion on the case. Those of the judges who have formed opinions do not agree. The cause must therefore be continued until next term." Shirley, p. 238.

said on the subject by the gentlemen to whom I was introduced. I had often casually heard the subject mentioned but knew nothing of its merits. After some search I was enabled to purchase the opinion of the Supreme Court of New Hampshire as delivered by the Chief Justice and read it the next day on my return to Windsor. That opinion furnished me with the few scanty facts I possessed in regard to the great constitutional question and it appeared to me on a hasty perusal of it that the legislature was competent to pass the laws in question, for I was led by the opinion to assume the fact that Dartmouth College was a public establishment for purposes of a general nature. I knew nothing nor do I now know anything material in respect to the policy or motives of the laws or what were the real inducements to pass them.

But I will declare to you with equal frankness that the fuller statement of facts in Mr. Webster's argument in respect to the original reasons and substance of the charter of 1769 and the sources of the gifts gives a new complexion to the case and it is very probable that if I was now to sit down and seriously study the case with the facts at large before me that I should be led to a different conclusion from the one which I had at first formed. But my hasty impressions one way or the other are not worth mentioning for I deem them of no value. I have merely stated those incidents to show how very acceptable is the argument you sent me.

Mr. Shirley comments:

As has already been suggested, the opinion of Judge Richardson contained a statement of facts; and the pamphlet produced by Kent gave precisely the same information as the State report. Probably no person was ever misled by the State report—except (?) Chancellor Kent. Strange as it may seem, Daniel Webster and Jeremiah Mason never discovered it.⁶⁸

We cannot but regard such a comment as disingenuous. The opinion of Richardson did give the facts very scantily and made no mention of the history of the Indian school, or the fact that Dr. Wheelock was named as the founder; and it is easily understandable how an able presentation of one side of a case will draw assent from one not already versed in the particular question under discussion, when a presentation of the opposite side might have produced an entirely different result.

Mr. Shirley does not give any authorities for his statement that Webster introduced the political aspect of the case into his argument, but the probabilities would certainly be that he did so. Mr. Lodge's very interesting picture of the nature of that part of the speech and its effect on Mar-

⁶⁸ Shirley, *The Dartmouth College Causes*, pp. 263-264.

shall is probably not far wrong. It seems, nevertheless, that this feature of the case has been over-emphasized because the soundness of the decision from the legal standpoint has been overlooked.

Given the doctrine of *Fletcher v. Peck*, the questions in the *College* case were: Was a charter grant a grant of property? Were charitable or educational institutions, public institutions? These questions were to be answered by examining the common law and then by subjecting it to such modifications as it had received in its adaptation to the needs of this country. The English precedents rather clearly supported the court upon both of these questions. The court might have said that the English doctrines were unsuited to this country, and particularly might they have said that these educational institutions were public institutions. Here, if anywhere, their political opinions may have had some play, but not, perhaps, as much as has often been thought.⁶⁶

Our view of *Fletcher v. Peck* is that here, also, the weight of authority upon the technical questions involved supported the opinion of the majority. But any judgment upon this case must be subject to a review of the evidence which was available to the court as to whether or not it was the intention of those who framed and adopted the Constitution that the "contracts clause" should extend to protect the contracts of the States, which is a matter we shall shortly consider. Of the two cases, *Fletcher v. Peck*, took far the larger step toward the position at which the court finally arrived. It established the principle of which *Dartmouth College v. Woodward* was merely the application, and it was with this conception in mind, undoubtedly, that Marshall admitted that it was quite possible that those who adopted the Constitution might never have had in contemplation the precise case of grants of corporate franchises.

The *College* case has, however, been used as the authority

⁶⁶ It should be noted that Justice Duval dissented, but as he wrote no opinion his reason for so doing cannot be known.

for sustaining all other franchise grants as well as grants of corporate franchises, because these secondary franchises were almost always found in the charters themselves, and were hence considered contracts without question. The effect of the ruling in the College case is now and has for some time been very largely nullified by the reservation, in the grants of corporate franchises, of the right to alter, amend or repeal them, to which the vast majority of existing charters are, without doubt, subject. Its effect is still noticeable in the decisions relating to secondary franchises, such as the franchises in city streets of public service corporations, which are often not subject to this reserved right of repeal.

In connection with the College case, must be always borne in mind the modifying doctrines of the Charles River Bridge case,⁶⁷ that state grants are to be construed strictly in favor of the state; of the so-called Granger cases,⁶⁸ that businesses affected with a public interest are subject to legislative regulation and control; of *The West River Bridge Co. v. Dix*⁶⁹ that franchises are always taken subject to the exercise of the power of eminent domain on the part of the state; and of *Stone v. Mississippi*,⁷⁰ and other cases, that the police power cannot be alienated. All these doctrines were undoubtedly felt to be necessary limitations upon the operation of the principles of the College case. How far they were actually necessitated would depend upon how general the practice had become, at the time these decisions were rendered, of reserving the right to repeal charters—a question which we are not prepared to answer.

The effect of the College case upon the body politic generally is, however, a question upon which we have made no special investigation and which is indeed most difficult of estimation. It may be said that, with the limitations which have been affixed to the doctrine, and with the reservation

⁶⁷ 11 Pet. 420 (1837).

⁶⁸ *Munn v. Illinois*, 94 U. S. 113 (1876), and the cases following.

⁶⁹ 6 How. 507 (1848).

⁷⁰ 101 U. S. 814 (1879).

of the right of repeal, now so common, there is not much ground for complaining of its being burdensome, although, as said before, it is still effective in the case of many secondary franchises. There is undoubtedly much truth in Mr. Cotten's remark: "That is the great effect, the great point of the case,—that it fixed the popular as well as the legal mind in favor of the stability of corporate enterprise and securities."⁷¹

When we speak of the limitations which have been affixed to the *College* case we do not mean to infer that these limitations are necessarily to be considered as deviations from its doctrine. That is quite a different question, and one which we shall not attempt to answer. Logically speaking, there is no incompatibility between the doctrines of *The Charles River Bridge* case, the *Granger* cases, *The West River Bridge Co. v. Dix* and *Stone v. Mississippi*, and the

⁷¹ Marshall's *Decisions*, ed. Cotten, p. 349. Sir Henry Maine has said: "I have seen the rule which denies to the several states the power to make any laws impairing the obligation of contracts criticised as if it were a mere politico-economical flourish; but in point of fact there is no more important provision of the Constitution. Its principle was much extended by a decision of the Supreme Court, which ought now to interest a large number of Englishmen, since it is the basis of the credit of many of the great American railway incorporations. But it is this prohibition which has in reality secured full play to the economical forces by which the achievement of cultivating the soil of the North American continent has been performed, it is the bulwark of American individualism against democratic impatience and socialistic fantasy." Maine, *Popular Government* (Essay IV.), p. 247. Mr. John F. Dillon has said: "The doctrine of the *Dartmouth College* case as applied by the Supreme Court in its various decisions, is not only sound, but has been one of the chief causes of our individual and national prosperity." John Marshall, ed. Dillon, vol. i, p. 370. Governor Baldwin says in his *American Political Institutions* at p. 121: "So did the little phrase impair the obligation of contracts,—like the genius of some Arabian tale at the touch of the magic wand of Chief Justice Marshall, rise and spread into the form of that invincible champion of chartered franchises by which the whole theory of American corporations was to be revolutionized once and again. And so, by means perhaps less direct, but no less controlling, has a new meaning been read into many a provision of statute or constitutions, by public opinion and the lapse of time,—a meaning by which the law, it may be, at last ceases to protect and begins to oppress society. Has not this been the history of the constitutional guaranty now under consideration?" It is, however, very difficult to gauge this moral effect of the case.

doctrine of the case under consideration. The question is, Was there a deviation in spirit between these cases?

It may be noted that the rule, that the power to legislate as to the forms of administering justice and as to the duties and powers of the courts was inalienable, was laid down in *Bank of Columbia v. Okely*,⁷² decided at the same term of court as *Dartmouth College v. Woodward*, so that it is not apparent that the later rulings as to the inalienability of the power of eminent domain and of the police power were opposed to the spirit of the College case.

As both the Charles River Bridge case and the Granger cases claim to be merely restatements of common law doctrine, it would require a careful examination of these decisions to see how far they were supported by the common law. If they really were supported by common law precedents it would not seem correct to say that they were deviations from the spirit of the College case. Story's own view of the Bridge case and his voucher for Marshall's⁷³ affords strong presumption, however, that this case was really contrary to the spirit which animated the justices in the College case, and that the result reached was largely due to a changed public opinion reflected in the new bench.

The case of *Illinois Central v. Illinois R. R. Co.*⁷⁴ is an interesting one. It may probably be said to be a departure from the spirit of the College case. Here it was held that a grant to a railroad company of an area of more than a thousand acres of the submerged land in the harbor of Chicago was merely a revocable license. The extent to which the decision of the majority was based upon expediency is seen from their admission that small parcels of submerged land such as are necessary for the construction of docks and "which when occupied do not substantially impair the public interest in the lands and waters remaining" might be granted. So submerged shoals and flats may be ceded. The minority come rather close to the truth when

⁷² 4 Wheat. 235, 245.

⁷³ 1 Watson on the Constitution, p. 810.

⁷⁴ 146 U. S. 487.

they say that the ruling of the majority essentially was that too big a grant had been made.

It remains to present a few other suggestions that have been made concerning the case, and particularly those made by Chief Justice Doe in the article already referred to.

Chief Justice Doe points out that Marshall's opinion in the College case is very largely based upon the fact that property had been given to the corporation upon the faith of its charter which, if the charter was subject to amendment or repeal, would be liable to forfeiture to the state or to be placed under the immediate control of the state. But as it has since been held that the property of corporations does not escheat to the state upon the repeal of the charter, but is regarded as a trust fund for the benefit of the members of the corporation, the *raison d'être* of the decision in that case, he maintains, has ceased to exist.

This argument does not, of course, attack the validity of the decision as applicable to the time at which it was rendered, inasmuch as the doctrine that the corporate property upon dissolution belongs to the shareholders was at that time unheard of. Nor, it may be noticed, could the argument yet be used in the case of religious and eleemosynary corporations for, as to these, the law seems still to be that their personal property is forfeited to the state upon the repeal of the charter.⁷⁵

Again, this argument does not affect the position taken by Justices Story and Washington, as they held that corporate franchises were property *per se*, and that the consideration for the grant was the benefit to the public resulting from the exercise of these powers. Nor is it clear that Marshall did not have that conception also. He seems to express it when he says: "The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country and this benefit constitutes the consideration, and in most cases the sole consideration of the grant."⁷⁶

⁷⁵ Church of Latter Day Saints v. United States, 136 U. S. 1.

⁷⁶ 12 Wheat. 518, 637.

Upon the abstract question, should the charters of business corporations be regarded as contracts, the argument is of some value. It amounts about to this: that incorporators do not give the state any real consideration for these grants of corporate franchises and therefore they should not be considered to be irrevocable. Were the question to be decided to-day, the argument might well prevail.⁷⁷

⁷⁷ Morawetz, in his work on private corporations, states that it is hard to find any contract between the state and its corporations, although he apparently thinks that one exists in the case of a special grant of corporate privileges. In the case of corporations formed under the provisions of a general law, he finds that, although there is no contract between the state and the incorporators, there is a contract between the corporators themselves which, under the "contract clause," the state is forbidden to impair. Thus he says that although the charter creates no contract between the state and the incorporators, nevertheless the state cannot amend the charter so as to alter the purposes of the corporation, as that would impair the obligation of the contract entered into among the incorporators. It is rather doubtful if this is a logically correct position. Mr. Morawetz goes so far as to hold that the state cannot repeal a charter, because to do so would impair the obligation, not of the contract between the corporators themselves, a position which, it seems to us, is unsound. See Morawetz, *Private Corporations*, Secs. 1047, 1048, 1054. In Taylor on Corporations is found this criticism of the case:

"Sec. 450: One may well raise the question whether this implied contract not to alter the constitution of a corporation would be held to exist, did the matter arise as *res nova* in regard to a general enabling statute. If the right to repeal were not reserved, presumably, under the authority of past decisions, courts would hold that the statute could not be repealed or changed so as to affect the right of existing corporations to carry on their business as under the statute. But would courts so hold in regard to a statute sanctioning limited partnerships? Is there any implied contract between the state and a limited partnership any more than between the state and an ordinary firm? No citizen by acting under a statute, any more than by acting under a rule of common law, acquires a right that the statute shall remain unrepealed so that he may always act under and be protected by its terms. And why should there be held to exist an implied contract between the state and an ordinary business corporation any more than between the state and a limited partnership? Still who is today rash enough to hint that the decision in the Dartmouth College Case was based on the false analogy between a grant of a franchise (i. e. the passage of a special law), and the grant of property? As Justice Davis said in the Binghampton Bridge: Courts are today estopped from questioning the doctrine of the Dartmouth College Case.

"Sec. 451: That the constitution of a corporation is law is more apparent in respect of corporations formed under general enabling statutes, while the characteristics of a contract appear more prominently where a special character is granted by the state to the cor-

Chief Justice Doe makes the further criticism upon the College case that even had the charter been granted by the legislature of New Hampshire instead of by the King of England, it could not have constituted an irrevocable contract for, inasmuch as the legislature's power of law-making had been merely delegated by the State, that body could not contract away this power. But if it be conceded that the States can contract, it would seem to be very narrow and technical reasoning to contend that the power to contract is not granted to the legislature under the ordinary grant of legislative power found in the State constitutions.

Again, Chief Justice Doe suggests that, under the doctrine of the strict construction of state contracts, which has been elaborated since the College case, upon the authority of the Charles River Bridge case, it can not be said that a grant of corporate franchises contains a contract not to repeal them, when the only way in which such a contract can be found is by implying one.

It may be that such a conclusion is entirely compatible with a logical application of the rule of strict construction. But the rule of strict construction is not always applied with logical precision. The court is inclined to protect those who have expended large sums of money on the faith of legislative grants, and has adhered to the principle that when the legislature grants franchises upon the faith of which large sums of money are spent, although such franchises are not expressly stated to be irrevocable, and though no time is fixed for the duration of such franchises, never-

porators. The differences between an enabling statute and a charter are, however, mainly differences in form. A charter as well as an enabling statute prescribes rules for conduct; the difference being that these rules in the case of a charter have a more limited application. And as an enabling statute, as well as a charter, proffers terms and facilities of action which are accepted by the corporators by filing their articles of association, only in the case of an enabling statute the terms are offered to the citizens of the state at large, any sufficient number of whom may accept them and incorporate themselves by complying with them." Taylor, Corporations, pp. 432-433. It is difficult to perceive whether Mr. Taylor's idea is that no corporate charters are contracts or only that corporations incorporated under the general law have no contract rights as against the state."

theless there is a condition implied in them that the legislature will not revoke its grant. If Justice Doe's position were correct, no public utility franchises would be contracts unless a specific period of existence was named in them, and possibly not then, if they are not expressly made irrevocable. But the Supreme Court has recently held that grants of franchises in the streets of cities to public utility companies, under which large sums of money are to be spent, are, although not expressly made irrevocable, and although their duration is not specified, of perpetual duration.⁷⁸

It has already been remarked, in the part of this chapter in which the general question of the power of the States to contract was considered, that there are no very clear logical lines to be drawn between contracts which the States may make and those which they may not make. The question may almost be said to be one of policy. Thus much room is left for difference of opinion upon this matter. It would seem that a line may properly be drawn somewhere between contracts concerning property, on the one side, and contracts concerning essential governmental powers, on the other. Practically every one will agree that it now seems rather incongruous to consider the taxing power as a subject of contract. It would seem much more reasonable to place it along with the power of eminent domain, the police power, and the power of administering justice, as not capable of being made the subject of contract. Public service franchises have uniformly been regarded as in the nature of property, and hence as the subject of contract. Contracts exempting public service corporations from rate regulation are close to the line. Another close case is that of *Illinois Central R. Co. v. Illinois*,⁷⁹ where it was held that the State could not make irrevocable grant of land covered by navigable waters, if it will substantially impair the public interest in the lands and waters remaining.

⁷⁸ *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100; *Boise Water Co. v. Boise City*, 230 U. S. 84.

⁷⁹ U. S. 387.

It remains to review the proceedings of the Constitutional Convention of 1787, of the State conventions, and the other historical data concerning the adoption of the "contracts clause." Justice Miller, in his lectures on the Constitution has said :

It has seemed probable to many judges and lawyers who have considered this clause of the Constitution that it was not designed by the framers of that instrument to do anything more than protect private contracts, those between individuals and those between individuals and private corporations, that is, not municipal corporations, but those organized for purposes of profit; and if it were now an original question, it is by no means certain but that this would be held to be the sound view of it. But those eminent men who at an early day had the duty of defining the meaning of this provision thought otherwise.⁸⁰

⁸⁰ Miller on the Constitution, p. 555.

CHAPTER V

THE "OBLIGATION OF CONTRACTS CLAUSE" AS VIEWED BY THE FRAMERS OF THE CONSTITUTION

Heretofore we have been engaged in a more or less technical examination of the "contracts clause" and the decisions construing it. We have been able to proceed thus far without considering the historical surroundings of the clause, because the decisions themselves were based on technical, rather than historical considerations. It remains for us, however, to review the proceedings in the Constitutional Convention and the other available data, to check up, as it were, the results already reached. The purpose will be twofold: to ascertain whether the information at the disposal of the court when the important decisions were made was such as should have assured a different result from that actually reached; secondly, to ascertain, as a matter of interest, what further opinions, undisclosed at the time of the rendering of the decisions before mentioned, were held by the "Fathers" as to this clause.

In truth the court had little in the way of historical information to assist it in laying out the field to be covered by the "contracts clause." The intentions of the Convention itself could not be ascertained, for the journal and debates were not published until after the important cases on this subject had been decided. The members of the Convention, moreover, had been pledged to secrecy.¹ Was there then a clear conception of the meaning of the clause prevailing generally throughout the land, at the time the Constitution was adopted?

¹ Farrand, *The records of the Federal Convention*, pp. xi, xiv. The journal was published in 1819. Various minutes were later published from time to time, and finally Madison's *Minutes of the debates* were published in 1840.

Turning, first, to the *Federalist*, the primary source of information on questions such as these and which, doubtless, acted as the most potent agency for moulding public opinion on matters of this kind, we find that the only treatment of the clause is in Number 44, at the hands of Madison. He there says:

Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights, and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society."²

In the discussion of the first clause of section 10 in the Virginia convention Patrick Henry feared that it might require the States to pay the continental paper money in full. Speaking of *ex post facto* laws and laws impairing the obligation of contracts, he said: "The expression includes public contracts, as well as private contracts between individuals. Notwithstanding the sagacity of the gentleman, he cannot prove its exclusive relation to private contracts."³ The answer given to this contention was that Congress and not the States had contracted to pay this debt. Governor Randolph called Henry's attention to the fact that Congress was only forbidden to pass *ex post facto* laws which re-

² *Federalist*, ed. Ford, p. 297.

³ *Elliott's Debates*, 474.

ferred only to criminal matters. He also said:

I am still a warm friend of the prohibition, because it must be promotive of virtue and justice, and preventive of injustice and fraud. If we take a review of the calamities which have befallen our reputation as a people, we shall find they have been produced by frequent interferences of the state legislatures with private contracts. If you will inspect the great cornerstone of republicanism, you will find it to be justice and honor.⁴

It will be noticed that Randolph nowhere denies Henry's contention that the "contracts clause" refers to the contracts of the States as well as to those between individuals.

In the debate in the North Carolina convention the question was raised, whether the clause had reference to the acts of the States as well as to contracts made between individuals. W. R. Davie, a member of the Constitutional convention, answered it in the negative, saying:

Mr. Chairman, I believe neither the 10th section, cited by the gentleman, nor any other part of the Constitution, has vested the general government with power to interfere with the public securities of any state. I will venture to say that the last thing which the general government will attempt to do will be this. They have nothing to do with it. The clause refers merely to contracts between individuals.⁵

There does not appear to have been any debate over the clause in a single other State convention, and the only other mention of it is to be found in Sherman's and Ellsworth's letter to the governor of Connecticut, and in Luther Martin's "Genuine Information" to the Maryland Legislature. Sherman and Ellsworth say:

The restraint on the legislatures of the several states respecting emitting bills of credit, making anything but money a tender in payment of debts, or impairing the obligation of contracts by *ex post facto* laws, was thought necessary as a security to commerce, in which the interests of foreigners, as well as of the citizens of different states may be affected.⁶

Martin said:

The same section also puts it out of the power of the States to make any thing but gold or silver coin a tender in payment of debts,

⁴ Ibid., 478.

⁵ 3 Farrand, Records of the Federal Convention, p. 349.

⁶ Ibid., vol. iii, p. 100.

or to pass any law impairing the obligations of contracts. I considered, Sir, that there might be times of such great public calamities and distress, and of such extreme scarcity of species, as should render it the duty of a government, for the preservation of even the most valuable part of its citizens, in some measure to interfere in their favor by passing laws totally or partially stopping the courts of justice, or authorizing the debtor to pay by instalments or by delivering up his property to his creditors at a reasonable and honest valuation. The times have been such as to render regulations of this kind necessary in most or all of the States, to prevent the wealthy creditor and the moneyed man from totally destroying the poor though even industrious debtor. Such times may again arrive. I therefore voted against depriving the States of this power, a power which I am decided they ought to possess, but which, I admit, ought only to be exercised on very important and urgent occasions. I apprehend, Sir, the principal cause of complaint among the people at large is the public and private debt with which they are oppressed, and which in the present scarcity of cash, threatens them with destruction, unless they can obtain so much indulgence in point of time, that by industry and frugality they may extricate themselves.⁷

A provision in the Northwest Ordinance, passed by Congress in 1787 before the work of the convention was finished, may also be noticed on account of the similarity of the language used and, as well, on account of the differences. The clause reads as follows:

And in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory that shall in any manner whatever interfere with or affect private contracts or engagements *bona fide* and without fraud previously formed.

This was all the documentary evidence that the court could have had in making its important decisions as to the meaning to be attributed to the "contracts clause." Of course it is true that the State laws passed during the existence of the Confederation which had impaired the obligation of private contracts by issuing depreciated paper currency and making it legal tender, allowing debts to be satisfied in property or paid in installments, and hindering creditors in their efforts to obtain redress,⁸ were necessarily matters of common knowledge. Considering then the particular evils which seem to have inspired the adoption of the

⁷ *Ibid.*, vol. iii, p. 214.

⁸ See Madison's introduction to the debates, 3 Farrand, Records of the Federal Convention, p. 548.

clause, the statement of Davie in the North Carolina convention and the general trend of Martin's argument as it was found in his *Genuine Information* (although there is no means of knowing whether the latter two sources of information were actually presented to the court), an inference might have been drawn that only private contracts were intended to be protected.

Against this may be placed several important considerations. The first and most important of all—one that we have already had occasion to call attention to and which, we think, has been too often overlooked in considering the course of the early decisions upon this clause of the Constitution—is that the most eminent jurists of the day, both at the time of the convention and for some years afterwards, were firm adherents to the doctrine of natural law. They were familiar with the theory of the natural obligation of contracts; they were familiar with the theory of the social compact; and the idea of a state's being bound by its contract must have been a perfectly natural one to them.

Jurists imbued with the theories of Austin, to whom the idea of the state's being obligated by a contract made with one of its citizens has always been an incongruous one, are apt to feel that the court was legislating in a most active way when it declared that the contracts of the States were included within the operation of the "contracts clause." They say that, what with the jealousy exhibited by the States on all occasions and with the very narrow margin by which the Constitution was actually carried through, it is inconceivable that it would have been adopted had the meaning of the "contracts clause," as it later developed, been fully explained.

We have already suggested, as a partial answer, that the theory of natural law, which recognized the contracts of states equally with those of individuals, was generally accepted at that time. Several proofs of this may be adduced. James Wilson—member of the Constitutional Convention,

the reputed author of the "contracts clause," one of the most influential men of his day, "reputed among the foremost in legal and political knowledge,"¹⁰ and later a justice of the Supreme Court of the United States—published in 1792 a number of lectures which he had delivered to a body of students. The following extracts from the lectures will illustrate the views which he held. "Sir William Blackstone," says Wilson, "tells us that the original of the obligation which a compact carries with it, is different from that of a law. The original of the obligation of a compact we know to be consent: the original of the obligation of an act of parliament we have traced minutely to the very same source." Again, he says, page 190: "Consent is the principle on which any claim, in consequence of his authority, can be made upon one man by another. Exclusively of the duties required by the law of nature, I cannot conceive of no claim that one man can make upon another but in consequence of his own consent." Naturally, to such a one, the spectacle of a state's being bound by a contract was perfectly congenial; and so we find: "It [the state] is an artificial person—it has its obligations and it has its rights. It may acquire property distinct from that of its members, it may incur debts, to be discharged out of the public stock, not out of the private fortunes of individuals: it may be bound by contracts and for damages arising *quasi ex contractu*."¹¹ It may also be mentioned that, in 1785, he had published an argument in opposition to a bill which had been introduced in the Pennsylvania Legislature for the purpose of repealing the charter granted by the State of Pennsylvania to the Bank of North America, in which he argued that the charter was a contract and that the legislature, therefore, had no power to repeal it.¹²

⁹ See argument in *Sturges v. Crowninshield*, 4 Wheat. 122.

¹⁰ 3 Farrand, *Records of the Federal Convention*, p. 91.

¹¹ 1 Wilson's Works, ed. Andrews, p. 183. It should be stated that he had made the argument as counsel for the bank before the legislature.

¹² 2 Wilson's Works, ed. Andrews, p. 565.

The doctrine which he then put forward is summed up in this form: "For these reasons, whenever the objects and makers of an instrument, passed under the form of a law, are not the same, it is to be considered as a compact and interpreted according to the rules and maxims by which compacts are governed."¹³

A brief statement from Merriam's American Political Theories will show the current political theory of revolutionary and post-revolutionary times. That writer says:¹⁴

By way of summary, it may be said that the leading doctrines of the revolutionary period were those of what is known as the *Natur-recht* school of political theory. They included the idea of an original state of nature, in which all men are born politically free and the contractual origin of government, the sovereignty of the people and the right of revolution against a government regarded as oppressive. . . . It will be observed that the spirit of this reasoning was decidedly individualistic. The starting point was the independent and sovereign individual endowed with a full set of natural rights. He consents to give up a part of these natural rights to form a government by means of a compact.

Not only was this natural law and social compact theory an accepted philosophical doctrine; it is often found stated in the opinions of the courts as well. Thus, in *Calder v. Bull*,¹⁵ decided in 1796, we find a polished and elaborate statement of it by Justice Chase. Then, in the early case of *Vanhorne's Lessee v. Dorrance*,¹⁶ decided in 1795, we find Justice Patterson of the Supreme Court contemplating with equanimity the possibility, not only of an act of the legislature's constituting a contract, but of its constituting a contract within the meaning of the "contracts clause." In answer to an argument of counsel to the effect that the act in question impaired the obligation of a contract, he merely says: "But if the confirming act be a contract between the Legislature of Pennsylvania and the Connecticut settlers, it must be governed by the rules and regulations which pervade all cases of contracts and if so, it is clearly void."

¹³ 1 Wilson's Works, ed. Andrews, p. 565.

¹⁴ American Political Theories, pp. 94-95.

¹⁵ 3 Dall. 386.

¹⁶ 2 Dall. 304.

The proceedings in the Virginia convention were favorable.

The language of the *Federalist*, which we have already quoted, was very broad and general. It is not specific, of course, but the very fact was one to which the court did, and we think rightly, attach considerable weight. Justice Johnson, who dissented in *Fletcher v. Peck*, was ready to admit that the clause applied to the contracts of the States. Speaking of this clause, he said: "There is reason to believe, from the letters of Publius, which are well entitled to the highest respect, that the object of the convention was to afford a general protection to individual rights against the acts of the state legislature. Whether the words 'acts impairing the obligation of contracts' can be construed to have the same force as must have been given to the words 'obligation and effect of contracts' is the difficulty in my mind." In other words, he contended only that a conveyance was not a contract.

Taking the broad general language of the clause, taking the equally general language of the *Federalist*, applying the principles of natural law, to which he adhered and by which, rather than by the common law, the wording of the clause was made intelligible, Chief Justice Marshall made his decision that the contracts of the States were protected from impairment. This decision was generally acquiesced in at the time and for sometime afterwards. Even the Justices who, in *Ogden v. Saunders*, disagreed with the Chief Justice, and refused to go the full length of the natural law theory, admitted that it was natural law which chiefly created the obligation of the contracts of the States themselves. It is by no means certain, therefore, that the Chief Justice was not justified in his belief that the framers of the Constitution intended the meaning which he gave. And it is difficult to say that he should have argued that the clause, so construed, would have caused the rejection of the Constitution and hence should not be construed according to what was, to him, the plain meaning of its terms. It remains to examine the proceedings of the convention itself.

It was not until slightly over two weeks before the close of the Convention that we find any reference to a provision relating to contracts. On Tuesday, August 28, Rufus King moved to add to the prohibitions upon the States, in the words of the Ordinance of Congress establishing new States—the Northwest Ordinance—a prohibition on the States to interfere in private contracts. Gouverneur Morris thought this would be going too far, as there are a thousand laws, he said, relating to the bringing and the limitation of actions which affect contracts. James Wilson was in favor of King's motion. Madison admitted that inconveniences might arise from such a prohibition, but thought these overbalanced by the utility of it. He conceived, however, that a negative on the State laws could alone secure the desired effect. Mason thought this carrying restraint too far, and thought that cases might happen where interference would be necessary, mentioning the case of statute of limitations. Wilson replied: "The answer to these objections is that retrospective interference only will be prohibited." Madison asked if that was not already done by the prohibition of *ex post facto* laws. This ended the debate, for the prohibition was voted simply against *ex post facto* laws.¹⁷ The next day Dickinson reported that, on consulting Blackstone, he found that the term "*ex post facto*" related to criminal cases only and would not, therefore, prevent the States from passing retrospective laws in civil cases. The draft was sent to the Committee of Style, however, on September 10, without any change being made. It was upon its return from this committee on September 12 that the "contracts clause" first made its appearance, the prohibition being directed to the passage of any laws "altering or impairing the obligation of contracts." An amendment, striking out the word "altering" was passed on the 14th of September, but a motion by Gerry, who "entered into observation inculcating the importance of public faith and the propriety of the restraint put on the states from impairing the obligation

¹⁷ Madison has it in his notes, "retrospective" law.

of contracts," to put Congress under the same restraint was not seconded. There is, also, a note found upon Mason's copy of the draft of February 12, to the effect that a motion to strike out "*ex post facto* laws," and, after the words "obligation of," to insert "previous" was refused. This motion is not found in the journal or in any other of the records of the debates.¹⁸

It is very plain that the convention had in mind only retrospective laws as impairing the obligation of contracts, and it is almost equally plain that they had in mind only the contracts of private individuals.

¹⁸ The history of this clause in the Convention is accurately described by Meigs in his *Growth of the Constitution*, pp. 182-186. Its history may easily be traced in Farrand's authoritative *Records of the Federal Convention*, by referring to the index which gives the places of reference of each clause. A reference to vol. ii, pp. 448, 449, should be added.

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